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DOCKET ENTRIES CIVIL ACTION 23268

## Civil Action 23268

UNITED STATES OF AMERICA

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

DOCKET ENTRIES IN UNITED STATES DISTRICT COURT

1. 9/13/57 Complaint filed. Summons exit. Order of Court fixing September 20, 1957 at 10:30 A.M. for hearing motion for preliminary injunction.

2. 9/20/57 Defendants' Motion for Stay of Proceeding filed.

3. 9/20/57 Motion to Dismiss Rule to Show Cause filed by Defendants. Hearing sur Motion for Preliminary Injunction. Hearing on Motion to Dismiss—Motion denied.

4. 9/20/57 Summons returned "on September 17, 1957 served" and filed.

5. 9/23/57 Transcript of hearing on September 20, 1957 filed.

6. 10/4/57 Temporary Injunction with Findings of Fact and Conclusions of Law filed. Noted and notice mailed 10/7/57.

7. 10/7/57 Appearance of Weston C. Overholt, Jr., Esq., for defendants filed.

8. 10/7/57 Certification of Service of Answer filed.

9. 10/7/57 Answer filed.

10. 10/21/57 Defendants' joint bond in the sum of $5,000, with Fidelity & Deposit Company of Md. as surety approved by the Court and filed.

11. 8/21/59 Plaintiff's motion to amend temporary injunction filed.

12. 11/19/59 Motion of Dairymen's League Cooperative Ass'n, Inc., Metropolitan Cooperative Milk Producers Bargaining Agency, Inc. and Mutual Federation of Independent Cooperatives, Inc. to intervene as defendants filed.

DOCKET ENTRIES CIVIL ACTION 23268

13. 11/30/59 Defendants' opposition to motion of Dairymen's League Cooperative Ass'n, Inc. et al. to intervene as defendants filed

14. 12/4/59 Affidavit of Edward F. Nuelo, Assistant Market Administrator, dated 9/12/57, filed. (This affidavit supports temporary injunction dated 10/4/57.)

15. 12/14/59 Supplement to Motion of Dairymen's League et al. to intervene as defendants filed.

16. 12/14/59 Defendants' opposition to Plaintiff's motion to amend temporary injunction etc. filed.

17. 2/8/60 Order of Court denying motion and supplemental motion of Dairymen's League et al. to intervene as defendants filed.

2/16/60 Argument sur Plaintiff's motion to amend temporary injunction.

18. 3/8/60 Transcript of hearing of 2/16/60 filed.

19. 4/25/60 Copy of Brief of Lehigh and Suncrest contra motion to intervene filed.

20. 4/25/60 Brief of U.S.A. filed.

21. 4/25/60 Opinion of Clary, J., filed.

5/23/60 Hearing on form of Judgment to be entered.

22. 6/1/60 Final Judgment denying and refusing plaintiff's motion for modification of preliminary injunction and mandatory injunction and dismissing complaint, vacating preliminary injunction and directing payment to defendants of amounts heretofore paid by them into Registry of the Court filed.

23. 6/16/60 Notice of appeal by U.S. filed.

24. 6/16/60 Copy of Clerk's notice to U.S. Court of Appeals filed.

6/17/60 Foregoing papers filed with U.S. Court of Appeals.

DOCKET ENTRIES CIVIL ACTION 26048

Civil Action 26048

LEHIGH VALLEY COOPERATIVE FARMERS,

*v.*

EZRA TAFT BENSON

DOCKET ENTRIES IN UNITED STATES DISTRICT COURT

1. 3/9/59 Complaint filed. Summons exit.

2. 3/17/59 Summons returned "on 3/10/59 served United States Attorney and Attorney General and on 3/11/59 served Defendant" filed.

3. 5/12/59 Stipulation and Order extending time for filing answer, filed.

4. 5/13/59 Appearance of Harold K. Wood, Esq. and Richard Reifsnyder, Esq. for defendant filed.

5. 5/13/59 Answer filed.

6. 8/25/59 Plaintiff's motion for summary judgment and consolidation of actions filed.

7. 8/25/59 Plaintiff's request to list motions on earliest possible argument list filed.

8. 8/31/59 Cross-motion for summary judgment filed.

9. 8/31/59 Defendants' opposition to consolidation of actions filed.

10 to 35. 9/23/59 Certified record (26 vols.) received from Department of Agriculture and filed.

36. 11/19/59 Motion of Dairymen's League et al. to intervene as defendants filed.

37. 11/30/59 Plaintiff's opposition to motion of Dairymen's League et al. to intervene as defendants filed.

38. 12/14/59 Brief on behalf of plaintiffs Daniels and Swope, filed.

39. 12/14/59 Supplement to motion of Dairymen's League et al. to intervene as defendants filed.

40. 2/8/60 Order of Court granting motion of Dairymen's League et al. for leave to intervene as amici curiae filed.

2/16/60 Argument sur Plaintiff's motion for summary judgment and consolidation and sur Defendant's cross-motion for summary judgment.

# TRANSCRIPT OF RECORD

## Supreme Court of the United States

**OCTOBER TERM, 1961**

## No. 79

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL., PETITIONERS,

*vs.*

UNITED STATES, ET AL.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT**

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**PETITION FOR CERTIORARI FILED APRIL 12, 1961**
**CERTIORARI GRANTED JUNE 19, 1961**

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DOCKET ENTRIES CIVIL ACTION 26048

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4/25/60 Copy of Brief of Lehigh and Suncrest filed.

41. 4/25/60 Copy of Brief of Dairymen's League et al. in support of motion to intervene filed.

42. 4/25/60 Copy of Brief of Dairymen's League et al. in support of Defendant's cross-motions for summary judgment filed.

4/25/60 Brief of U.S.A. filed.

43. 4/25/60 Transcript of Evidence relating to sections 927.83 and 927.84 of Order No. 27 prepared by Daniels and Swope filed.

44. 4/25/60 Brief of Plaintiff filed.

4/25/60 Opinion of Judge Clary filed.

45. 6/1/60 Final Judgment remanding case to Secretary of Agriculture for action consistent herewith filed.

46. 6/16/60 Notice of Appeal by U.S. filed.

47. 6/16/60 Copy of Clerk's notice to U.S. Court of Appeals filed.

48. 6/17/60 Amended Notice of Appeal filed.

6/17/60 Foregoing papers filed with U.S. Court of Appeals.

DOCKET ENTRIES CIVIL ACTION 26109

Civil Action 26109

SUNCREST FARMS, INC.,

*v.*

EZRA TAFT BENSON

DOCKET ENTRIES IN UNITED STATES DISTRICT COURT

1. 3/20/59 Complaint filed. Summons exit.

2. 4/17/59 Summons returned.

3. 5/13/59 Appearance of Harold K. Wood, Esq. and Richard Reifsnyder, Esq. for defendant filed.

4. 5/13/59 Answer filed.

5. 8/23/59 Plaintiff's motion for summary judgment and consolidation of actions filed.

8/25/59 Plaintiff's request to list motions on earliest possible argument list filed.

6. 8/31/59 Cross-motion for summary judgment filed.

7. 8/31/59 Defendants' opposition to consolidation of actions filed.

8. 9/23/59 Certified Record received from Dept. of Agriculture and filed. Incorporates by reference relevant portions of record in Lehigh case.

9. 11/19/59 Motion of Dairymen's League et al. to intervene as defendants filed.

10. 11/30/59 Plaintiff's opposition to motion of Dairymen's League et al. to intervene as defendants filed.

12/14/59 Brief on behalf of plaintiffs, Daniels and Swope, filed.

11. 12/14/59 Supplement to motion of Dairymen's League et al. to intervene as defendants filed.

12. 2/8/60 Order of Court granting motion of Dairymen's League et al. for leave to intervene as amici curiae filed.

2/16/60 Argument sur Plaintiff's motion for summary judgment and consolidation and sur Defendant's cross-motion for summary judgment.

3/8/60 Transcript of hearing 2/16/60 filed.

4/25/60 Copy of Brief of Lehigh and Suncrest filed.

DOCKET ENTRIES CIVIL ACTION 26109

4/25/60 Copy of Brief of Dairymen's League et al. in support of motion to intervene filed.

4/25/60 Copy of Brief of Dairymen's League et al. in support of Defendant's cross-motions for summary judgment filed.

4/25/60 Brief of U.S.A. filed.

4/25/60 Transcript of Evidence relating to sections 927.83 and 927.84 of Order No. 27 prepared by Daniels and Swope filed.

4/25/60 Brief of Plaintiff filed.

4/25/60 Opinion of Judge Clary filed.

13. 6/11/60 Final Judgment remanding case to Secretary of Agriculture for action consistent herewith filed.

14. 6/16/60 Notice of Appeal by U.S. filed.

15. 6/16/60 Copy of Clerk's notice to U.S. Court of Appeals filed.

16. 6/17/60 Amended Notice of Appeal.

6/17/60 Foregoing papers filed with U.S. Court of Appeals.

DOCKET ENTRIES IN ALL APPEALS

No. 13289

UNITED STATES OF AMERICA,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

No. 13290

LEHIGH VALLEY COOPERATIVE FARMERS,

*v.*

EZRA TAFT BENSON

No. 13291

SUNCREST FARMS, INC.,

*v.*

EZRA TAFT BENSON

DOCKET ENTRIES IN ALL APPEALS

6/17/60 Copy of Notice of Appeal filed.
6/17/60 Record and Exhibits filed.
6/17/60 Motion of Dairymen's League et al. to participate.
6/18/60 Appearance of Alan S. Rosenthal, Neil Brooks and J. Charles Krause for appellant.
6/18/60 Motion by appellants for injunction pending appeal.
6/18/60 Certificate of Service of motion for injunction.
6/20/60 Appellee's Answer to Motion for injunction filed.
6/20/60 Appearance of Walter E. Alessandroni and Henry R. Heebner, Jr. for appellant.
6/20/60 Order granting injunction pending appeal.
6/20/60 Appearance of Daniels and Swope by Willis F. Daniels for appellees.

6/22/60 Motion of New England Milk Producers Association for leave to participate as amicus curiae filed.

6/23/60 Order granting Dairymen's League et al. leave to participate as amici curiae.

6/25/60 Appearance of Benjamin Quigg, Jr. and Anson W. H. Taylor, Jr. for amici curiae.

6/28/60 Opposition of appellees to motion of New England Milk Producers Association for leave to intervene as amicus curiae.

ADMINISTRATIVE PETITION LEHIGH VALLEY

UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE

DOCKET NO. AMA 27-123

IN THE MATTER OF LEHIGH VALLEY COOPERATIVE FARMERS

PETITION UNDER SECTION 15(A) AGRICULTURAL MARKETING AGREEMENT ACT, REGARDING AMENDMENTS TO ORDER NO. 27, DATED THE 10TH DAY OF JUNE, 1957, PARTIALLY EFFECTIVE JULY 1, 1957, EFFECTIVE IN ITS ENTIRETY AUGUST 1, 1957.

TO THE HONORABLE, THE SECRETARY OF AGRICULTURE:

The petition of Lehigh Valley Cooperative Farmers, with its principal place of business at Allentown, Pennsylvania, by its attorneys, Daniels and Swope, respectfully represents:

1. The correct name of the Cooperative is Lehigh Valley Cooperative Farmers, with its principal place of business in Allentown, Pennsylvania.

A. Petitioner is a Pennsylvania corporation, with its principal place of business at Allentown, Pennsylvania, incorporated February 24, 1933, under the Cooperative Laws of Pennsylvania, Act of April 30, 1929, P.L. 855. The Officers and Directors of the corporation and their addresses are as follows:

Glen A. Boger, President, Allentown, R. D. #2, Pennsylvania Howard H. Lutz, Vice-President, Kempton, Pennsylvania Chas. W. Hoffman, Secretary, Neffs, Pennsylvania Wilmer H. Hill, Treasurer, Rt. 1, Slatington, Pennsylvania Bayard Hindmach, Route No. 4, Easton, Pennsylvania Harold Ziegler, Route No. 1 Benningsville, Pennsylavnia Sterling Riter, Route No. 3, Easton, Pennsylvania

B. The above petitioner sells and has sold milk in the extended Marketing Area of Order No. 27, and is subject to the provisions or in the alternative to some of the provisions of Order No. 27 as amended.

2. On June 10, 1957, the Secretary of Agriculture promulgated certain amendments to Order No. 27, covering the handling of milk in the Marketing Area now known as the New York-New Jersey Milk Marketing Area, to become effective August 1, 1957.

3. The provisions of Order No. 27 which your Petitioner challenges are as follows:

A. Amendment to Section 927.3, insofar as it includes any part of the State of New Jersey in the Marketing Area of Order No. 27.

B. Sections 927.83, 927.84 insofar as they require compensatory payments to be made by non-pool plants or by non-pool Order No. 27 plants, which are regulated by another Federal Order which permits deductions of the amount of compensatory payments from the amounts otherwise due for such milk.

4. This petition is based upon the following facts:

A. Your Petitioner is a Cooperative, with a membership of approximately 1,000 milk producers who ship all of their milk throughout the year to your Petitioner.

B. Your Petitioner is engaged in the following business:

(1) Receiving, processing, packaging and selling fluid milk and cream to consumers, stores, restaurants, hotels, etc.

(2) Receiving, processing, tanking and selling milk to other handlers.

(3) Manufacturing and selling to consumers and others ice cream.

(4) Manufacturing and selling to consumers and others cottage cheese.

(5) Manufacturing and selling powder, condensed and butter.

(6) The sales of the products set forth in sub-paragraphs (1) to (5) inclusive are made in Northern New Jersey, which is now part of the Marketing Area of Order No. 27, in Pennsylvania, and in other areas.

C. Your Petitioner operates under the Capper-Volstead Act, wherein it regulates cooperatives, and subscribes to all the other cooperative laws of the United States and the Commonwealth of Pennsylvania.

D. Your Petitioner returns to its producers a higher blend price than it would be required to pay under the prices established by the Pennsylvania Milk Control Commission or under the prices established by Order No. 27.

E. Your Petitioner never has, nor is it now, turning back on the market generally, or to its producers, any amount of milk, no matter how great the flush.

F. Your Petitioner carries all of the surplus associated with its fluid sales; never has it burdened Order No. 27 with any of its surplus.

G. The members of your Petitioner have geared their operations to the relatively high returns received by your Petitioner.

H. Your Petitioner sells its packaged milk in Northern New Jersey, and has always sold its packaged milk in Northern New Jersey, at the Office of Milk Industry prices or higher, and, when no prices were fixed by the Office of Milk Industry, sold its milk at the going retail and wholesale prices.

I. Your Petitioner does and always has sold bulk milk in Northern New Jersey at prices higher than the Northern New Jersey handlers who bought such milk could have bought it for under Order No. 27 prices.

J. Your Petitioner is not now and never has offered milk in Northern New Jersey at "cut rate" prices, either to other handlers or to wholesale or retail buyers.

K. Your Petitioner, by virtue of selling milk in Northern New Jersey which is now part of the Marketing Area of Order No. 27, may either upon application become a pool plant, or will be required to pay compensatory payments to the Order No. 27 pool, in an amount which equals the difference between the Class 3 price and the Class 1-A price for all fluid sales made in this territory, and the difference between the Class 3 price and the Class 2 price for all sales made in the territory classified as Class 2.

L. Impressing the Order No. 27 provisions on its 1956 business would have cost your Petitioner as payment to the pool approximately $632,000.00 if it held a pool status, or approximately $284,000.00, if it was a non-pool plant.

M. The payments immediately above set forth are substantial, and would reduce the income of each producer member of the Cooperative substantially, but would increase the income to the other 55,000 to 60,000 producers under Order No. 27 infinitesimally.

N. The Northern New Jersey territory is of such size and consists of such a population (approximately four million people) that good administration would require it to be a separate area, if an Order is justified.

O. The following facts distinguish the Northern New Jersey area from what was previously the Marketing Area of Order No. 27:

(1) Resale pricing is established in Northern New Jersey by a regulatory agency of the State of New Jersey. No resale pricing is established in New York.

(2) The population is housed in more horizontal building areas, while the major part of Metropolitan New York is in vertical.

(3) 70% of the milk sold in Metropolitan New York is wholesale, 30% retail. In Northern New Jersey the reverse is true.

(4) In Metropolitan New York very little, in fact an infinitesimal amount, of Guernsey milk is sold, whereas in Northern New Jersey large amounts are being sold.

(5) The Northern New Jersey producers have a very large percentage of Guernsey herds, and over the years have established those herds, depending upon a different price being established for their production than for other milk. In Metropolitan New York, this is not a fact.

(6) Northern New Jersey carries the surplus associated with its Class 1 sales. Order No. 27 invited

entirely too much milk under the Order, thus reducing the blend price abnormally low.

(7) Many other reasons which will be established upon further consideration of this Petition.

(8) There were no facts in the record which would justify the conclusion that the marketing conditions of Northern New Jersey were disorderly or unstable. The testimony did indicate that the consumers of Northern New Jersey had a very adequate supply of pure and wholesome milk for all fluid needs.

5. Your Petitioner will be substantially and adversely affected by the provisions of the Order herein complained of in the following manner:

A. Be required to pay to the Order No. 27 pool for distribution among 55,000 to 60,000 producers shipping to pool plants, either $632,000.00 or $284,000.00 per year.

B. If a pool plant, will be required to pay as an administrative fee approximately $32,000.00 per year.

C. Will be unable to continue in business in Northern New Jersey if such large amounts are required to be paid into the Order No. 27 pool, by reason of doing business in Northern New Jersey.

6. Your Petitioner challenges the action of the Secretary in issuing the amendments herein complained of, for the following reasons:

A. Issuance of the aforesaid amendments is unconstitutional, illegal in that it violates the Marketing Agreement Act of 1937, as amended, the Administrative Procedure Act, and the established Rules of Practice. The action is arbitrary and capricious; the Order will not effectuate the declared purposes of the Agricultural Agreement Act of 1937, as amended, but on the contrary will create disorder and instability due to the unwarranted hardships and inequities it visits upon thousands of producers and many handlers.

B. The Secretary erred in accepting the Deputy Administrator's findings and conclusions which completely ignored the distinctions existing between the Northern New Jersey

area and the Marketing Area of Order No. 27, and disregarded the population of four million people of Northern New Jersey, which would establish this area as an economic and administrative entity within itself. It was error to follow the Deputy Administrator's finding that 1C milk in Northen New Jersey detracted from the effectiveness of the regulatory program under Order No. 27; the testimony clearly establishes that the 1C classification and pricing created disorder in Northern New Jersey, and acted as a deterrent to the effectiveness of the Office of Milk Industry regulation for Northern New Jersey. The provisions regarding 1C milk were established by the Secretary of Agriculture as a provision of Order No. 27. The Secretary, in adopting the Deputy Administrator's reasoning, in effect employed as a basis for establishing the extended area the disorder created by the Secretary of Agriculture when the provisions concerning 1C milk were established.

C. The procedure followed by the Secretary of Agriculture in this hearing, in adopting the disposition of the Deputy Administrator of the objections made during the hearing by the interested parties, was an erroneous action and violates the spirit of the applicable statutes and the rules and regulations. The cavalier manner in which the objections and briefs were dealt with strikes at the very fundamental bases of a sound and equitable administrative practice. The disposition of the exceptions filed to the recommended decision, which was accepted by the Secretary of Agriculture, was erroneous as no sound nor thorough consideration of such exceptions is evidenced by the Findings and Discussion which support the final Order.

D. The Secretary of Agriculture erred in issuing a supplemental call as of February 26, 1957 (22 F. R. 1219), opening the hearing on a proposal for a "single Order" or "comprehensive Order", and ordering the resumption of the hearing on March 5, 1957. The original call did not include as a proposal such a suggested provision. The hearing on the original call opened on June 18, 1956, and continued for 85 hearing days. The direct and cross examination of all witnesses was limited to the call, and the pro-

visions within the call, which did not include a single or comprehensive Order. The supplemental call did not reach the interested parties until sometime subsequent to February 26, 1957, but the hearing was resumed on the supplemental call as of March 5, 1957. Such an erroneous procedure placed many handlers and thousands of producers at a distinct disadvantage, in fact made it impossible in any adequate manner to deal with the new proposal.

E. The Secretary of Agriculture erred in issuing an Order to include the enlarged territory including Northern New Jersey based upon the record established following the supplemental call, without giving all Northern New Jersey interested parties a fair and reasonable opportunity to meet the issue. Those interested in the Northern New Jersey area were lulled into a false sense of security by at least two releases issued by the United States Department of Agriculture stating that there were to be conferences among various cooperatives upon invitation issued to them. The releases stated, in effect, that if the conferences failed to produce unanimity of opinion among all the interested cooperatives that were invited to attend, the hearing would proceed on the original call, but if there was an indication of unanimity, the recess would be extended.

The invitations were issued by the Market Administrator, and unanimity of opinion was not achieved; nevertheless, the call was radically and basically changed, and all interested parties were thrown into a hearing on a completely new issue with virtually no notice, and certainly with inadequate legal notice.

Your Petitioner, a party of record, representing approximately 1,000 milk producers, was not invited to the conferences held during the recess between December and March. This non-recognition on the part of the United States Department of Agriculture and the Market Administrator is totally and entirely unjustified, and exhibits a disposition to ignore your Petitioner. This non-recognition by the Department of Agriculture creates the impression that this Cooperative, universally recognized as being highly successful in the milk field, was to have its success minimized

in order to bolster somewhat other Cooperatives that have not exhibited such a degree of efficiency in any sense.

F. The Secretary of Agriculture erred in accepting the Deputy Administrator's disposition of the request made by interested parties that certain economists, i.e., Dr. Pearce, Dr. Johnston, Dr. Young and Dr. Black, be recalled for further cross examination and direct examination concerning the new issue of a single Order, such cross and direct examination having previously been ruled imaterial and irrelevant since the single or comprehensive Order was not within the call.

Cross examination on all the issues involved that were touched upon by direct examination is a fundamental principle of jurisprudence, even in administrative hearings. The discussion of whether or not there should be an Order at all, or a separate Order, is sufficient basis for cross examination concerning a single Order. The ruling of the Deputy Administrator in approving the rulings of the Hearing Officer on this question converted the hearing into what may very properly be termed a "perfunctory" hearing.

G. The Secretary of Agriculture erred in the issuance of this Order upon the record as established upon the calls of the hearing in such a manner as gives your Petitioner the election of petitioning to be a pool plant at a cost of $632,000.00, or of remaining a non-pool plant and making payments to the pool of compensatory payments in the sum of $284,000.00. The latter sum would cost each producer belonging to the Petitioning Cooperative an average of $300.00 per year and would benefit the other 60,000 producers shipping ten billion pounds of milk a year only .28 of a cent per hundredweight. The inequities are perfectly apparent when the figures are stated. This will cause instability and a feeling of insecurity among the 1000 producers that prior to this time had never existed.

H. The Secretary erred in adopting the Deputy Administrator's conclusions that Northern New Jersey was actually a part of the New York Metropolitan Area, and failing to find as a fact the very basic differences which the record

establishes as existing between Metropolitan New York and Northern New Jersey. Some of the more pertinent differences have been previously set forth in this petition.

I. The Secretary of Agriculture erred in accepting the Deputy Administrator's disposition of the motion not to continue with the hearing on the supplemental call and in not calling previously called witnesses without any discussion of the legal points involved in the motion and the request.

J. The Secretary of Agriculture erred in accepting the Deputy Administrator's ruling that all rulings of the Presiding Officer, to which specific objections are taken, are affirmed. This statement amounts to nothing more than a categorical dismissal and shows no indication of thought or analysis. Such action must be termed arbitrary and capricious.

K. The Deputy Administrator erred and the Secretary of Agriculture erred, in rejecting your Petitioner's request for findings of fact and conclusions of law, and the Exceptions filed to the recommended decision for the reasons herein set forth in this Petition.

L. The Deputy Administrator and the Secretary of Agriculture erred in amending this Order to include the Northern New Jersey territory inasmuch as the Marketing Agreement Act does not give to the Secretary authority to promulgate Orders affecting a market unless there is instability or disorder in the market and must take into consideration the fact that there is a sufficient supply of fluid milk for the consumers in the area. The facts established beyond question that there was a sufficient supply of milk and that the market was not disorderly or unstable.

7. Your Petitioner states as further reasons in support of its objection to Sections 927.83 and 927.84 the following:

A. The Secretary of Agriculture erred in interpreting the Marketing Agreement Act as authorizing this type of

compensatory payment. One of the main purposes of the statute is to return to producers a uniform price either by way of a handler pool or a market-wide pool, and to provide that the milk bought by handlers and sold in the Marketing Area is carried at a uniform cost to all handlers for milk put to the same use. The statute does not authorize the Secretary to impress upon any handler a penalty for doing business in the Marketing Area, but requires only that non-pool milk should not come in at "cut-rate" prices. The statute does not guarantee the market to groups of producers shipping to pool plants, nor is the Secretary authorized to attempt to accomplish this.

B. The Secretary erred in not following the law as established in the case of KASS v. BRANNAN, 196 Fed. 2d 791. The Court characterized this type of payment as a penalty, stating this terminology was a most accurate description. It was declared in this decision that compensatory payments violated the provision of the statute respecting uniform costs to handlers. It was pointed out that the Act requires uniformity so far as minimum prices to producers and minimum costs to handlers are concerned.

If the handler pays as much for his non-pool milk as he would be required to pay for pool milk, then he has not brought into the market cheap milk. His cost is uniform with his competing handler. If the classification price due the producer shipping non-pool milk is the same or higher than the classification price due the producer shipping pool milk, then the producer is being treated in a uniform manner. The fact that one market might be a handler pool and another market a market-wide pool makes no fundamental difference, as all handlers account for their milk on a handler pool basis, regardless of whether the producer is paid on a market-wide basis or a handler basis.

C. The Secretary erred in accepting the Deputy Administrator's conclusion that Order No. 27 carries a surplus for the market served by your Petitioner or those similarly situated. There was no testimony worthy of supporting a finding which would warrant such a conclusion. The Deputy

Administrator's findings in this regard are indeed at the most very fragmentary.

D. The Secretary erred in promulgating this provision in the Order, which amounts to establishing tariffs or barriers interfering with the free flow of milk across state lines. Such a procedure is not authorized by the Marketing Agreement Act and is condemned by the Constitution of the United States.

E. The Secretary erred in accepting the findings of the Deputy Administrator in promulgating this provision without reference to the testimony of Mr. Glen Boger, President of the petitioning organization. There was no discussion or analysis of his testimony. Mr. Boger's testimony established that your Petitioner handled 184,465,474 pounds of milk in the year ending January 31, 1957; that in the low month of November, your Petitioner handled 13,210,995 pounds, and in the high month of May, 18,352,734 pounds of milk. The Deputy Administrator ignored the obvious fact that this variance in production indicated no surplus problem. The Deputy Administrator also ignored the uncontradicated testimony of your Petitioner's President and General Manager, that your Petitioner has never diverted, directly or indirectly, any milk at any time of the year, to Order No. 27 plants, and that from his knowledge of the Allentown-Easton-Phillipsburg area, all dealers in that area operate in a like manner. The Deputy Administrator erred in not taking recognition of the relatively small amount and constancy of the milk from the Allentown-Easton-Phillipsburg area that was sold in New Jersey, indicating no dumping of surplus. The Secretary erred in accepting the Deputy Administrator's conclusions without a thorough analysis of this very pertinent, relevant, material and uncontroverted testimony.

F. The Deputy Administrator erred, and the Secretary erred in approving his action, in concluding the propriety of compensatory payments when the testimony, uncontradicted, was to the effect that your Petitioner charged the handlers for bulk milk sold as Class 1 and Class 2 in the

now extended Northern New Jersey territory, prices far in excess of what have been and will be paid producers under the prices established by Order No. 27, and returned to its producers for milk sold in this same territory in packaged form much higher prices than would be required of an Order No. 27 handler for milk sold for the same use.

G. The Deputy Administrator and the Secretary of Agriculture erred in promulgating the provision here challenged in a discriminatory manner, in that non-pool milk shipped into Northern New Jersey or other parts of the Marketing Area, which is subject to another Federal Order, need only pay the plus difference between what the milk would have been priced at under the other Order, and what it would have been priced at under Order No. 27, except where the other Order carries a "deduction provision" for such payments.

Your Petitioner is discriminated against in that it operates under the provisions of the Milk Control Law of Pennsylvania, or under the provisions of Order No. 61, which carries a "deduction provision". The "deduction provision" under Order No. 61 is merely a "paper provision" as it in no way returns to your Petitioner the compensatory payments. The Milk Control Commission of Pennsylvania has no such "deduction provision". A handler under the Boston Order may ship milk into the Marketing Area of Order No. 27 and be required to pay no compensatory payments, or only those represented by the plus difference between the Boston Order price and Order No. 27 price, while your Petitioner, if shipping into the same area, whether subject to Order No. 61 or the Milk Control Law, will have levied upon his milk compensatory payments which by any approach of logic result in its producers receiving less money for the milk even when it is not sold in unfair competition with other milk in the Marketing Area. Such discrimination runs counter to the Marketing Agreement Act, and is illegal and void.

H. The Deputy Administrator and the Secretary of Agriculture erred in treating this hearing as one for amendments to Order No. 27. The hearing, in reality, was a promulgation hearing for the thirteen Northern New Jersey counties which now become part of the extended territory. This area was not previously a part of the Marketing Area, nor were the producers or handlers located and/or selling milk in the area generally subject to the Order. A hearing that contemplated including such a vast territory in an already established Order amounts to a promulgation hearing insofar as the proposed extended territory is concerned, and all of the provisions of the existing Order are open. The period of time required for a promulgation hearing should have been granted all interested parties. The Deputy Administrator and the Secretary erred in establishing any of the provisions of Order No. 27 as amended, which in fact is a new Order, on any record established prior to June 18, 1956. The hearings establishing the records prior to that date dealt only with amendments to Order No. 27, and resulted in a Marketing Area not including Northern New Jersey. Hence, to base any of the provisions of the now existing Order No. 27 on any phases of any of those records would be to impress upon Northern New Jersey producers and handlers provisions of an Order without first holding a hearing within the contemplation of the Congress in enacting the Marketing Agreement Act and the Administrative Procedure Act.

The promulgation of any provisions which amounted to a re-statement of any of the original provisions of Order No. 27 as amended, to be a part of Order No. 27 to be effective August 1, 1957, is erroneous action on the part of the Deputy Administrator and the Secretary of Agriculture, for the reason just immediately above set forth.

I. The action of the Secretary of Agriculture in the issuance of the two sections herein complained of is erroneous, contrary to law, arbitrary and capricious and, therefore, illegal, unconstitutional and void.

8. Your Petitioner prays for the following specific relief:

A. That a hearing be afforded your Petitioner wherein it may produce witnesses and evidence to support the allegations heretofore made.

B. That Section 927.3, insofar as it includes any part of Northern New Jersey in the Marketing Area of Order No. 27, be revoked and declared illegal and void.

C. That your Petitioner be not required to pay compensatory payments as provided for under Sections 927.83 and 927.84 by either amending or revoking these sections.

D. That your Petitioner be granted an opportunity for oral argument.

E. That the Secretary of Agriculture, pending final disposition of this petition, immediately postpone, suspend or revoke the effective date of Order No. 27 as amended to become effective August 1, 1957, or to postpone, suspend or revoke the effective date of the two sections herein complained of insofar as they were amended as of June 10, 1957, to be effective August 1, 1957.

LEHIGH VALLEY COOPERATIVE FARMERS,
by GLEN A. BOGER, *Pres.*

DANIELS and SWOPE,
*Attorneys for Petitioner.*
By WILLIS F. DANIELS,
*Commerce Building,*
*Harrisburg, Pennsylvania.*

Date: July 26, 1957.

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of , ss:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, Glen A. Boger, who being duly sworn according to law deposes and says that

he is President and General Manager of Lehigh Valley Cooperative Farmers, Petitioner named in the foregoing Petition, and that the averments contained therein are true and correct to the best of his knowledge, information and belief, and that this Petition is filed in good faith, and is not made for the purpose of delay.

GLEN A. BOGER.

Sworn to and subscribed before me this 26th day of July, 1957.

GEORGE A. BAUMER,
*Notary Public*

*Allentown, Lehigh County, Pa.*

My Commission Expires Jan. 20, 1959.

ANSWER OF RESPONDENT

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-123

IN THE MATTER OF LEHIGH VALLEY COOPERATIVE FARMERS, PETITIONER

## ANSWER OF RESPONDENT

Respondent, the Deputy Administrator for Marketing Services, Agricultural Marketing Service, answers the petition filed herein on August 1, 1957, as follows, but for the purposes of this proceeding only. This is a review proceeding for the purpose of determining whether the action of the Secretary in issuing Order No. 27, as amended, is supported by sufficient evidence in the hearing record upon which he acted and is otherwise in accordance with law. The lawfulness of the challenged provisions must, therefore, be determined upon the basis of the evidence contained in such record upon which such provisions were promulgated and de novo evidence may not be received with respect to any such issues.

1. Respondent does not controvert paragraphs 1 and 2 thereof.

2. Respondent does not controvert paragraph 3 thereof, but for the full and complete text of the sections therein enumerated, reference is made to Order No. 27, as amended, effective August 1, 1957, (22 FR 4643).

3. Respondent does not controvert the allegations contained in sub-paragraphs A and B of paragraph 4.

4. Respondent does not have sufficient knowledge or information of the facts alleged in order to form a belief and, therefore, controverts the allegations contained in all other sub-paragraphs of paragraph 4 and paragraph 5.

5. Respondent controverts paragraphs 6 and 7.

Paragraph 8 is the relief prayed for and, therefore, is neither admitted or controverted.

WHEREFORE, having fully answered, respondent requests:

(1) That this petition be dismissed on its merits;

(2) That the action of the Secretary in promulgating the provisions of Order No. 27, and the amendments thereto, effective August 1, 1957, be held to be in accordance with law; and

(3) That respondent be given all such other, further and different relief as may seem just and proper.

ROY W. LENNARTSON,
*Deputy Administrator for*
*Marketing Services.*

JOHN M. DURBIN,
*Attorney for Respondent.*

ADMINISTRATIVE PETITION SUNCREST FARMS

UNITED STATES OF AMERICA, DEPARTMENT OF AGRICULTURE

DOCKET NO. AMA 27-121

IN THE MATTER OF SUNCREST FARMS, INC.

PETITION UNDER SECTION 15(A) AGRICULTURAL MARKETING AGREEMENT ACT, REGARDING AMENDMENTS TO ORDER NO. 27, DATED THE 10TH DAY OF JUNE, 1957, PARTIALLY EFFECTIVE JULY 1, 1957, EFFECTIVE IN ITS ENTIRETY AUGUST 1, 1957.

TO THE HONORABLE, THE SECRETARY OF AGRICULTURE:

The petition of Suncrest Farms, Inc., with its principal place of business at Bethlehem, Pennsylvania, by its attorneys, Daniels and Swope, respectfully represents:

1. The correct name of your Petitioner is Suncrest Farms, Inc., with its principal place of business at Bethlehem, Pennsylvania.

A. Petitioner is a Pennsylvania corporation, incorporated December 16, 1953, (original name of corporation was Suncrest Farms & Mowrer's, Inc.), 1414 Millard Street, Bethlehem, Pennsylvania. The officers and directors of the corporation are as follows:

Clifton E. Mowrer, President, 632 Edgeboro Boulevard, Bethlehem, Pennsylvania
Rudolph P. Yohonic, Vice-President, Magnolia Drive, Easton, Pennsylvania
Edward D. Glass, Secretary-Treasurer, 1930 Sycamore Street, Bethlehem, Pennsylvania

B. The above Petitioner is engaged in the business of handling, processing and selling milk in the extended Marketing Area of Order No. 27, and has been so engaged over a long period of time. Order No. 27 as amended to become effective August 1, 1957, subjects your Petitioner to some or all of its provisions.

2. On June 10, 1957, the Secretary of Agriculture promulgated certain amendments to Order No. 27, covering the handling of milk in the Marketing Area now known as the New York-New Jersey Milk Marketing Area, to become effective August 1, 1957.

3. The provisions of Order No. 27 which your Petitioner challenges are as follows:

A. Amendment to Section 927.3, insofar as it includes any part of the State of New Jersey in the Marketing Area of Order No. 27.

B. Sections 927.83-927.84 insofar as they require compensatory payments to be made by non-pool plants or by non-pool Order No. 27 plants, which are regulated by another Federal Order which permits deductions of the amount of compensatory payments from the amounts otherwise due for such milk.

4. This petition is based upon the following facts:

A. Your Petitioner is a corporation engaged in the milk business, and receives its milk from farmer-producers.

B. Your Petitioner is engaged in the following business:

(1) Receiving, processing, packaging and selling fluid milk and cream to consumers, stores, restaurants, hotels, etc.

(2) Receiving, processing, tanking and selling milk to other handlers.

(3) Manufacturing and selling to consumers and others ice cream.

(4) Manufacturing and selling to consumers and others cottage cheese.

(5) The sales of the products set forth in sub-paragraphs (1) to (4) inclusive are made in Northern New Jersey, which is now part of the Marketing Area of Order No. 27, in Pennsylvania, and in other areas.

C. Your Petitioner returns to its producers a higher blend price than it would be required to pay under the prices established by Order No. 27. These blend prices are

arrived at by applying the class prices fixed by the Pennsylvania Milk Control Commission.

D. Your Petitioner never has nor is it now turning back on the market generally or to its producers any amount of milk, no matter how great the surplus.

E. Your Petitioner carries all of the surplus associated with its fluid sales; never has it burdened Order No. 27 with any of its surplus.

F. Your Petitioner sells its packaged milk in Northern New Jersey, and has always sold its packaged milk in Northern New Jersey, at the Office of Milk Industry prices or higher, and, when no prices were fixed by the Office of Milk Industry, sold its milk at the going retail and wholesale prices.

G. Your Petitioner does and always has sold bulk milk in Northern New Jersey at prices higher than the Northern New Jersey handlers who bought such milk could have bought it for under Order No. 27 prices.

H. Your Petitioner is not now and never has offered milk in Northern New Jersey at "cut-rate" prices, either to other handlers or to wholesale or retail buyers.

I. Your Petitioner, by virtue of selling milk in Northern New Jersey which is now part of the Marketing Area of Order No. 27, may either upon application become a pool plant, or will be required to pay compensatory payments to the Order No. 27 pool, in an amount which equals the difference between the Class 3 price and the Class 1A price for all fluid sales made in this territory, and the difference between the Class 3 price and the Class 2 price for all sales made in the territory classified as Class 2.

J. Impressing the Order No. 27 provisions on the business of your Petitioner will require compensatory payments to be made into the Order No. 27 pool in amounts ranging from $2,000 to $2,500 per month. In the alternative your Petitioner could become a pool plant. In this event, its producers would receive a much lower blend price than they are now receiving. In either case, the Milk Control Commission of Pennsylvania would require their

prices to be returned to your Petitioner's producers which would cost your Petitioner a substantial sum of money.

K. The payments immediately above referred to are substantial, but when divided among the 55,000 to 60,000 producers under Order No. 27, the results to these producers would be infinitesimal.

L. The Northern New Jersey territory is of such size and consists of such a population (approximately four million people) that good administration would require it to be a separate area, if an Order is justified.

M. The following facts distinguish the Northern New Jersey area from what was previously the Marketing Area of Order No. 27:

(1) Resale pricing is established in Northern New Jersey by a regulatory agency of the State of New Jersey. No resale pricing is established in New York.

(2) The population is housed in more horizontal building areas, while the major part of Metropolitan New York is in vertical.

(3) 70% of the milk sold in Metropolitan New York is wholesale, 30% retail. In Northern New Jersey the reverse is true.

(4) In Metropolitan New York very little in fact an infinitesimal amount, of Guernsey milk is sold, whereas in Northern New Jersey large amounts are being sold.

(5) The Northern New Jersey producers have a very large percentage of Guernsey herds, and over the years have established those herds, depending upon a different price being established for their production than for other milk. In Metropolitan New York, this is not a fact.

(6) Northern New Jersey carries the surplus associated with its Class 1 sales. Order No. 27 invited entirely too much milk under the Order, thus reducing the blend price abnormally low.

(7) Many other reasons which will be established upon further consideration of this Petition.

(8) There were no facts in the record which would justify the conclusion that the marketing conditions of Northern New Jersey were disorderly or unstable. The testimony did indicate that the consumers of Northern New Jersey had a very adequate supply of pure and wholesome milk for all fluid needs.

5. Your Petitioner will be substantially and adversely affected by the provisions of the Order herein complained of in the following manner:

A. Be required to pay to the Order No. 27 pool for distribution among 55,000 to 60,000 producers shipping to pool plants $24,000 to $30,000 per year, and in addition be required to pay its producers additional sums in order to meet the prices established by the Pennsylvania Milk Control Commission. The producers of your Petitioner are producers located in the state of Pennsylvania, with negligible exceptions.

B. If a pool plant, a larger sum will be required to be paid to the Order No. 27 pool as your Petitioner has a higher Class 1 utilization, or a Class 1 A utilization, than the market pool under Order No. 27, and would be required to pay an administrative fee to the Market Administrator in a substantial amount.

C. Will be unable to continue in business in Northern New Jersey if such large amounts are required to be paid into the Order No. 27 pool, by reason of doing business in Northern New Jersey.

6. Your Petitioner challenges the action of the Secretary in issuing the amendments herein complained of, for the following reasons:

A. Issuance of the aforesaid amendments is unconstitutional, illegal in that it violates the Marketing Agreement Act of 1937, as amended, the Administrative Procedure Act, and the established Rules of Practice. The action is arbitrary and capricious; the Order will not effectuate the declared purposes of the Agricultural Agreement Act of 1937, as amended, but on the contrary will create disorder

and instability due to the unwarranted hardships and inequities it visits upon thousands of producers and many handlers.

B. The Secretary erred in accepting the Deputy Administrator's findings and conclusions which completely ignored the distinctions existing between the Northern New Jersey area and the Marketing Area of Order No. 27, and disregarded the population of four million people of Northern New Jersey, which would establish this area as an economic and administrative entity within itself. It was error to follow the Deputy Administrator's finding that 1C milk in Northern New Jersey detracted from the effectiveness of the regulatory program under Order No. 27; the testimony clearly establishes that the 1C classification and pricing created disorder in Northern New Jersey, and acted as a deterrent to the effectiveness of the Office of Milk Industry regulation for Northern New Jersey. The provisions regarding 1C milk were established by the Secretary of Agriculture as a provision of Order No. 27. The Secretary, in adopting the Deputy Administrator's reasoning, in effect employed as a basis for establishing the extended area the disorder created by the Secretary of Agriculture when the provisions concerning 1C milk were established.

C. The procedure followed by the Secretary of Agriculture in this hearing, in adopting the disposition of the Deputy Administrator of the objections made during the hearing by the interested parties, was an erroneous action and violates the spirit of the applicable statutes and the rules and regulations. The cavalier manner in which the objections and briefs were dealt with strikes at the very fundamental bases of a sound and equitable administrative practice. The disposition of the Exceptions filed to the recommended decision, which was accepted by the Secretary of Agriculture, was erroneous as no sound nor thorough consideration of such exceptions is evidenced by the Findings and Discussion which support the final Order.

D. The Secretary of Agriculture erred in issuing a

supplemental call as of February 26, 1957 (22 F. R. 1219), opening the hearing on a proposal for a "single Order" or "comprehensive Order", and ordering the resumption of the hearing on March 5, 1957. The original call did not include as a proposal such a suggested provision. The hearing on the original call opened on June 18, 1956, and continued for 85 hearing days. The direct and cross examination of all witnesses was limited to the call, and the provisions within the call, which did not include a single or comprehensive Order. The supplemental call did not reach the interested parties until sometime subsequent to February 26, 1957, but the hearing was resumed on the supplemental call as of March 5, 1957. Such an erroneous procedure placed many handlers and thousands of producers at a distinct disadvantage, in fact made it impossible in any adequate manner to deal with the new proposal.

E. The Secretary of Agriculture erred in issuing an Order to include the enlarged territory including Northern New Jersey based upon the record established following the supplemental call, without giving all Northern New Jersey interested parties a fair and reasonable opportunity to meet the issue. Those interested in the Northern New Jersey area were lulled into a false sense of security by at least two releases issued by the United States Department of Agriculture stating that there were to be conferences among various cooperatives upon invitation issued to them. The releases stated, in effect, that if the conferences failed to produce unanimity of opinion among all the interested cooperatives that were invited to attend, the hearing would proceed on the original call, but if there was an indication of unanimity, the recess would be extended.

The invitations were issued by the Market Administrator, and unanimity of opinion was not achieved; nevertheless, the call was radically and basically changed, and all interested parties were thrown into a hearing on a completely new issue with virtually no notice, and certainly with inadequate legal notice.

F. The Secretary of Agriculture erred in accepting the Deputy Administrator's disposition of the request made by interested parties that certain economists, i.e., Dr. Pearce, Dr. Johnston, Dr. Young and Dr. Black, be recalled for further cross examination and direct examination concerning the new issue of a single Order, such cross and direct examination having previously been ruled immaterial and irrelevant since the single or comprehensive Order was not within the call.

Cross examination on all the issues involved that were touched upon by direct examination is a fundamental principle of jurisprudence, even in administrative hearings. The discussion of whether or not there should be an Order at all, or a separate Order, is sufficient basis for cross examination concerning a single Order. The ruling of the Deputy Administrator in approving the rulings of the Hearing Officer on this question converted the hearing into what may very properly be termed a "perfunctory" hearing.

G. The Secretary of Agriculture erred in the issuance of this Order upon the record as established upon the calls of the hearing in such a manner as gives your Petitioner the election of petitioning to be a pool plant at a substantial cost, or of remaining a non-pool plant and making payments to the pool of compensatory payments in the sum of $24,000 to $30,000 a year.

H. The Secretary erred in adopting the Deputy Administrator's conclusions that Northern New Jersey was actually a part of the New York Metropolitan Area, and failing to find as a fact the very basic differences which the record establishes as existing between Metropolitan New York and Northern New Jersey. Some of the more pertinent differences have been previously set forth in this petition.

I. The Secretary of Agriculture erred in accepting the Deputy Administrator's disposition of the motion not to continue with the hearing on the supplemental call and in not calling previously called witnesses without any discussion of the legal points involved in the motion and the request.

J. The Secretary of Agriculture erred in accepting the Deputy Administrator's ruling that all rulings of the Presiding Officer, to which specific objections are taken, are affirmed. This statement amounts to nothing more than a categorical dismissal and shows no indication of thought or analysis. Such action must be termed arbitrary and capricious.

K. The Deputy Administrator erred and the Secretary of Agriculture erred, in rejecting your Petitioner's request for findings of fact and conclusions of law, and the Exceptions filed to the recommended decision for the reasons herein set forth in this Petition.

L. The Deputy Administrator and the Secretary of Agriculture erred in amending this Order to include the Northern New Jersey territory, inasmuch as the Marketing Agreement Act does not give to the Secretary authority to promulgate Orders affecting a market unless there is instability or disorder in the market and must take into consideration the fact that there is a sufficient supply of fluid milk for the consumers in the area. The facts established beyond question that there was a sufficient supply of milk and that the market was not disorderly or unstable.

7. Your Petitioner states as further reasons in support of its objection to Sections 927.83-927.84 the following:

A. The Secretary of Agriculture erred in interpreting the Marketing Agreement Act as authorizing this type of compensatory payment. One of the main purposes of the statute is to return to producers a uniform price either by way of a handler pool or a market-wide pool, and to provide that the milk bought by handlers and sold in the Marketing Area is carried at a uniform cost to all handlers for milk put to the same use. The statute does not authorize the Secretary to impress upon any handler a penalty for doing business in the Marketing Area, but requires only that nonpool milk should not come in at "cut-rate" prices. The statute does not guarantee the market to groups of producers shipping to pool plants, nor is the Secretary authorized to attempt to accomplish this.

B. The Secretary erred in not following the law as established in the case of KASS v. BRANNAN, 196 Fed. 2d 791. The Court characterized this type of payment as a penalty, stating this terminology was a most accurate description. It was declared in this decision that compensatory payments violated the provision of the statute respecting uniform costs to handlers. It was pointed out that the Act requires uniformity so far as the minimum prices to producers and minimum costs to handlers are concerned.

If the handler pays as much for his non-pool milk as he would be required to pay for pool milk, then he has not brought into the market cheap milk. His cost is uniform with his competing handler. If the classification price due the producer shipping non-pool milk is the same or higher than the classification price due the producer shipping pool milk, then the producer is being treated in a uniform manner. The fact that one market might be a handler pool and another market a market-wide pool makes no fundamental difference, as all handlers account for their milk on a handler pool basis, regardless of whether the producer is paid on a market-wide basis or a handler basis.

C. The Secretary erred in accepting the Deputy Administrator's conclusion that Order No. 27 carries a surplus for the market served by your Petitioner or those similarly situated. There was no testimony worthy of supporting a finding which would warrant such a conclusion. The Deputy Administrator's findings in this regard are indeed at the most very fragmentary.

D. The Secretary erred in promulgating this provision in the Order, which amounts to establishing tariffs or barriers interfering with the free flow of milk across state lines. Such a procedure is not authorized by the Marketing Agreement Act and is condemned by the Constitution of the United States.

E. The Secretary of Agriculture erred in accepting the findings of the Deputy Administrator in promulgating this provision without reference to the testimony of Mr. Glen Boger, President of the Lehigh Vally Cooperative Farmers. Mr. Boger's testimony established that his organiza-

tion and your Petitioner handled the surplus associated with their Class 1 needs, and did not at any time dump or turn milk into the Order No. 27 pool as surplus milk. Mr. Boger further testified that from his knowledge of the Allentown-Easton-Phillipsburg area, all dealers in that area operated in a like manner. The Deputy Administrator erred in not taking recognition of the relatively small amount and constancy of the milk from the Allentown-Easton-Phillipsburg area that was sold in New Jersey, indicating no dumping of surplus. The Secretary erred in accepting the Deputy Administrator's conclusions without a thorough analysis of this very pertinent, relevant, material and uncontroverted testimony.

F. The Deputy Administrator and the Secretary of Agriculture erred in promulgating the provision here challenged in a discriminatory manner, in that non-pool milk shipped into Northern New Jersey or other parts of the Marketing Area, which is subject to another Federal Order, need only pay the plus difference between what the milk would have been priced at under the other Order, and what it would have been priced at under Order No. 27, except where the other Order carries a "deduction provision" for such payments.

Your Petitioner is discriminated against in that it operates under the provisions of the Milk Control Law of Pennsylvania. The Orders under this law which regulate your Petitioner carry no "deduction provision". A handler under the Boston Order may ship milk into the Marketing Area of Order No. 27 and be required to pay no compensatory payments, or only those represented by the plus difference between the Boston Order price and Order No. 27 price, while your Petitioner, if shipping into the same area, whether subject to Order No. 61 or the Milk Control Law, will have levied upon his milk compensatory payments which by any approach of logic result in its producers receiving less money for the milk even when it is not sold in unfair competition with other milk in the Mar-

keting Area. Such discrimination runs counter to the Marketing Agreement Act, and is illegal and void.

G. The Deputy Administrator and the Secretary of Agriculture erred in treating this hearing as one for amendments to Order No. 27. The hearing, in reality, was a promulgation hearing for the thirteen Northern New Jersey counties which now become part of the extended territory. This area was not previously a part of the Marketing Area, nor were the producers or handlers located and/or selling milk in the area generally subject to the Order. A hearing that contemplated including such a vast territory in an already established Order amounts to a promulgation hearing insofar as the proposed extended territory is concerned, and all of the provisions of the existing Order are open. The period of time required for a promulgation hearing should have been granted all interested parties. The Deputy Administrator and the Secretary erred in establishing any of the provisions of Order No. 27 as amended, which in fact is a new Order, on any record established prior to June 18, 1956. The hearings establishing the records prior to that date dealt only with amendments to Order No. 27, and resulted in a Marketing Area not including Northern New Jersey. Hence, to base any of the provisions of the now existing Order No. 27 on any phases of any of those records would be to impress upon Northern New Jersey producers and handlers provisions of an Order without first holding a hearing within the contemplation of the Congress in enacting the Marketing Agreement Act and the Administrative Procedure Act.

The promulgation of any provisions which amounted to a re-statement or any of the original provisions of Order No. 27 as amended, to be a part of Order No. 27 to be effective August 1, 1957, is erroneous action on the part of the Deputy Administrator and the Secretary of Agriculture, for the reason just immediately above set forth.

H. The action of the Secretary of Agriculture in the issuance of the two sections herein complained of is erro-

neous, contrary to law, arbitrary and capricious, and therefore, illegal, unconstitutional and void.

8. Your Petitioner prays for the following specific relief:

A. That a hearing be afforded your Petitioner wherein it may produce witnesses and evidence to support the allegations heretofore made.

B. That Section 927.3, insofar as it includes any part of Northern New Jersey in the Marketing Area of Order No. 27, be revoked and declared illegal and void.

C. That your Petitioner be not required to pay compensatory payments as provided for under Sections 927.83 and 927.84 by either amending or revoking these sections.

D. That your Petitioner be granted an opportunity for oral argument.

E. That the Secretary of Agriculture, pending final disposition of this Petition, immediately postpone, suspend or revoke the effective date of Order No. 27 as amended to become effective August 1, 1957, or to postpone, suspend or revoke the effective date of the two sections herein complained of insofar as they were amended as of June 10, 1957, to be effective August 1, 1957.

SUNCREST FARMS, INC.,
By RUDOLPH P. YOHONIC,
*Vice. Pres.*

DANIELS and SWOPE,
*Attorneys for Petitioner.*
By WILLIS F. DANIELS,
*Commerce Building,*
*Harrisburg, Pennsylvania.*

Date: July 26, 1957.

ADMINISTRATIVE PETITION SUNCREST FARMS

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA,
County of Lehigh, ss:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, Rudolph P. Yohonic, who being duly sworn according to law deposes and says that he is Vice President of Suncrest Farms, Inc., Petitioner named in the foregoing Petition, and that the averments contained therein are true and correct to the best of his knowledge, information and belief, and that this Petition is filed in good faith, and is not made for the purpose of delay.

RUDOLPH P. YOHONIC.

Sworn to and subscribed before me this 26th day of July, 1957.

GEORGE A. BAUMER,
*Notary Public,*
*Allentown, Lehigh County, Pa.*

[SEAL] My Commission expires Jan. 20, 1959.

ANSWER OF RESPONDENT

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-121

In the matter of SUNCREST FARMS, INC., PETITIONER

ANSWER OF RESPONDENT

Respondent, the Deputy Administrator for Marketing Services, Agricultural Marketing Service, answers the petition filed herein on August 1, 1957, as follows, but for the purposes of this proceeding only. This is a review proceeding, for the purpose of determining whether the action of the Secretary in issuing Order No. 27, as amended, is supported by sufficient evidence in the hearing record upon which he acted and is otherwise in accordance with law. The lawfulness of the challenged provisions must, therefore, be determined upon the basis of the evidence contained in such record, upon which such provisions were promulgated and de novo evidence may not be received with respect to any such issues.

1. Respondent does not controvert paragraphs 1 and 2 thereof.

2. Respondent does not controvert paragraph 3 thereof, but for the full and complete text of the sections therein enumerated, reference is made to Order No. 27, as amended, effective, August 1, 1957 (22 FR 4643).

3. Respondent does not have sufficient knowledge or information of the facts alleged to form a belief and therefore, controverts the allegations contained in all other sub-paragraphs of paragraph 4, except sub-paragraph L and M.

4. Respondent controverts sub-paragraph L of paragraph 4.

5. Respondent does not controvert sub-paragraph 1 of sub-paragraph M of paragraph 4.

6. Respondent does not have sufficient knowledge or information of the facts alleged to form a belief and, therefore, controverts sub-paragraphs 2 through 7 of sub-paragraph M of paragraph 4.

7. Respondent controverts sub-paragraph 8 of sub-paragraph M of paragraph 4.

8. Respondent does not have sufficient knowledge or information of the facts alleged to form a belief and, therefore, controverts sub-paragraphs A and B of paragraph 5.

9. Respondent controverts the opening statement of paragraph 5 and sub-paragraph C of paragraph 5.

10. Respondent controverts paragraph 6 and paragraph 7.

Paragraph 8 is the relief prayed for and, therefore, is neither admitted or controverted.

WHEREFORE, having fully answered, respondent requests:

(1) That this petition be dismissed on its merits.

(2) That the action of the Secretary in promulgating the provisions of Order No. 27, and the amendments thereto, be held to be in accordance with law, and

(3) That respondent be given all such other, further and different relief as may seem just and proper.

ROY W. LENNARTSON,
*Deputy Administrator for*
*Marketing Services.*

JOHN M. DURBIN,
*Attorney for Respondent.*

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-121

In re: SUNCREST FARMS, INC., PETITIONER

## EXAMINER'S REPORT

### *Preliminary Statement*

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), involving the validity of provisions of Order No. 27 (7 CFR, Part 927), which regulates the handling of milk in the New York-New Jersey metropolitan area. The proceeding was instituted by a petition filed on August 1, 1957, by Suncrest Farms, Inc., of Bethlehem, Pennsylvania, a milk dealer, or handler, which distributes some of its milk in the area covered by Order No. 27. Petitioner alleges that there was defective notice of the hearing on which amendments to Order No. 27 were based, and that the record of that hearing does not support the extension of the prescribed marketing area to New Jersey, nor the application of the compensatory payment provisions to New Jersey. The Agricultural Marketing Service, United States Department of Agriculture, the respondent, filed an answer on August 23, 1957, contending that the hearing and the resulting amendments were "in accordance with law".

Petitioner's application for interim relief was denied by the Judicial Officer on September 13, 1957 (16 A.D. 875).

An oral hearing on the petition was held in New York City on October 23 and 24, 1957, before Hearing Examiner Jack W. Bain. Willis F. Daniels and Harold W. Swope, of the firm of Daniels & Swope, Attorneys at Law, Harrisburg, Pennsylvania, appeared for petitioner, and John M. Durbin, Attorney at Law, of the Office of the General Counsel, United States Department of Agriculture, appeared for respondent. The Hearing Examiner ruled that the validity of the attacked amendments and provisions of the Order

must be tested on the record upon which they were based, and not upon new evidence received in this proceeding. Official notice was taken of various items related to the hearing, herein called the promulgation hearing, at which that basic record, called the promulgation record, was made. Evidence was taken concerning the petitioner's operations and how it is affected by Order provisions, much of which was received for the limited purpose of determining whether petitioner should be exempted from Order provisions, and not for the purpose of determining the general validity of the provisions.

Respondent asked that official notice be taken of an earlier promulgation record which served as the basis for putting the compensatory payment provisions into Order No. 27 before the marketing area included any of New Jersey. Petitioner objected, asserting that it is not here attacking those provisions as they existed before August 1, 1957, but only as they were made applicable to New Jersey territory, and to petitioner, by the 1957 amendments. In view of this statement, and because the earlier promulgation record was refused admission as a part of the promulgation record for the 1957 amendments, the Hearing Examiner sustained the objection.

On November 6, 1957, Dairymen's League Co-operative Association, Inc., Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., and Mutual Federation of Independent Cooperatives, Inc., through their attorneys, Frank B. Lent and Richard Wiles of Syracuse, New York, and William J. Moore of New York, New York, filed a joint application to intervene in the proceeding. Oral request had been made at the hearing, but upon objection by petitioner, the Hearing Examiner had asked that written application be filed and answered. Applicants alleged that petitioner's attacks upon Order No. 27 involved a threat to the whole Order, which might result in serious damage to the market for the milk of their membership of over 30,000 producers. Respondent did not object, but petitioner did, stating *inter alia* that Order No. 27 could operate without the attacked provisions, as it had done before. On

December 2, 1957, the Hearing Examiner granted the applicants' request to the extent that they be allowed to file briefs and participate in oral argument, in accordance with the Rules of Practice (7 CFR 900.57).

Petitioner filed a brief in support of its contentions on December 16, 1957, citing parts of the promulgation record. On February 21, 1958, respondent filed its brief, citing 5,225 pages of the promulgation record, including those cited by petitioner. The intervenors filed a brief supporting the validity of the Order provisions, citing a few pages of the promulgation record, including one page not cited by respondent. Petitioner filed its reply brief on April 7, 1958.

*Proposed Findings of Fact*

1. Suncrest Farms, Inc., the petitioner, is a Pennsylvania corporation whose address is 1414 Millard Street, Bethlehem, Pennsylvania. It is a handler as that term is defined in Order No. 27.

2. On March 3, 1956, "Notice of Opportunity to Submit Proposals", issued by a Deputy Administrator, Agricultural Marketing Service, was published in the Federal Register (21 F.R. 1418), quoting in full a statement issued by the Secretary of Agriculture on February 23, 1956. In the statement it was said that after considerable public discussion, etc., concerning a separate milk order for New Jersey or extension of Order No. 27 to include New Jersey, it had been decided that the most expeditious method of accomplishing the purpose of adequate regulation of the whole area was to hold a hearing to consider a separate order for New Jersey, together with complementary changes in Order No. 27. Further proposals along this line were invited by March 16. It was indicated that no proposals for a "comprehensive" order for the whole area would be considered.

3. On May 25, 1956, a notice of hearing, signed by the same Deputy Administrator, was published in the Federal Register (21 F.R. 3537-3579) in "Docket Nos. AO-71-A32, AO-284", the hearing to begin on June 18, 1956, in Newark,

New Jersey, and to continue later in Albany, Poughkeepsie, Binghamton, Elmira, Utica, and Syracuse, New York. Reference was made to the notice mentioned in Finding 2 and an earlier statement said to have been published at 20 F.R. 10167, and the purpose of the hearing was said to be to receive evidence concerning a proposed separate milk order for Northern New Jersey and proposed amendments to Order No. 27. The proposed Northern New Jersey order would cover 13 counties in New Jersey and six in New York, but it was to be considered whether these six should be included in Order No. 27 or divided between it and the Northern New Jersey order. Section 990.98 of one of the Northern New Jersey proposals would provide for compensatory payments. Among the last three proposals listed in the notice was one by Lehigh Valley Cooperative Farmers and the Warren County Milk Dealers' Association, to the effect that payments by Pennsylvania handlers on milk distributed in the marketing area should be made to such handlers' producers rather than to the Northern New Jersey pool.

4. On June 2, 1956, a Supplemental Notice signed by the same Deputy Administrator was published (21 F.R. 3799), adding proposals for amending Order No. 27, but adding nothing as to Northern New Jersey.

5. On September 9, 1956, a "Supplemental Notice Concerning Procedure", signed by the Acting Secretary of Agriculture, was published (21 F.R. 6680), providing that beginning September 10, 1956, the hearing would be confined to the proposals concerning extension of Order No. 27. When evidence on these was completed, the transcript was to be certified and the record closed on these issues, and the hearing was to continue on all other issues, the record before and after this certification and closing to be the record on such other issues.

6. By a news release dated January 2, 1957, the Secretary of Agriculture announced that the hearing, recessed on December 20, 1956, to January 7, 1957, would not be resumed until February 4, in the hope that the additional time would result in a better understanding among inter-

ested producer groups holding widely divergent views and positions, and ultimately in an earlier conclusion of the hearing.

7. In a mimeographed document dated January 28, 1957, the Secretary of Agriculture announced that sufficient progress toward a more nearly common position was being made by producer groups to warrant extension of the recess, and that the hearing was further continued to February 18, 1957.

8. In a mimeographed document dated February 21, 1957, it is stated that the Secretary of Agriculture announced that the hearing would reconvene on March 5 to receive evidence on a single order covering the New Jersey and New York area. It is said that the announcement followed a conference with Dr. Everett Case, President of Colgate University, who had been working with producer groups trying to arrive at a more nearly common position on the proposed regulation, and who reported that substantial agreement had been reached on proposed terms and provisions of an order. It concludes: "Formal public notice covering this new approach will be issued shortly."

9. On February 27, 1957, a notice by the Hearing Examiner, dated February 21, 1957, was published (22 F.R. 1128), indicating that the hearing would reconvene on March 5, 1957, in New York City.

10. On February 28, 1957, a Supplemental Notice of Hearing, dated February 26, and signed by the same Deputy Administrator, was published (22 F.R. 1219), amending prior notices to include consideration of a single order covering all of the proposed territory to be regulated, and whether regulation should be by a new order or by Order No. 27 amended. One proposal was that the terms of the single order should be those of the then existing Order No. 27, with appropriate alterations.

11. At sessions of the promulgation hearing held on June 19, 20, 22, 26-29, and August 1-3, 7 and 8, 1956, according to the 1,483 pages of the transcript cited in briefs filed in this 15-A proceeding, a large part of the questions, answers, objections, etc., involved the relative merits of a separate

order for Northern New Jersey, as proposed in the notice of hearing, and a comprehensive order covering the New York and New Jersey territory, as excluded from consideration in the notice. It was recognized that no comprehensive order could be issued, due to the restricted notice, but evidence favoring the comprehensive order was received to support contentions that a separate order should not be issued. It also appears from these pages that the questions of Federal regulation for New Jersey or not, and a separate or a comprehensive order, had been much discussed by the milk industry for at least the preceding two or three years.

12. For the sessions held between August 8, 1956, and March 5, 1957, respondent cited 2,400 more pages of the transcript, a few of which were also cited by petitioner. For reasons stated in the Conclusions below, time has not been taken to read these pages.

13. The following Findings concerning evidence are based upon that received at sessions of the promulgation hearing held on and after March 5, 1957.

14. There is testimony to the effect that New Jersey State regulation does not cover interstate shipped milk; that payments to producers for milk in Northern New Jersey are partly unregulated, partly regulated by New Jersey, partly regulated by Federal Order No. 27; and that Federal regulation is needed (P.H.R. [Promulgation Hearing Record], pages 12,828, 12,864, 13,706-13,712, 14,155-15,156). No evidence which would come near to outweighing this has been cited.

15. There is evidence that Northern New Jersey is a part of one single market for milk, which market includes the area then covered, and that proposed to be covered, by Order No. 27, supplies coming from the same general milk shed, producers being intermingled, handlers taking milk back and forth, many consumers going back and forth daily, Order No. 27 then carrying part of the surplus associated with that part of the market outside the Order No. 27 marketing area (P.H.R. 12,772, 12,792, 12,811-12,812, 12,909-12,920, 12,924, 12,933, 13,397-13,399, 13,417, 13,952, 14,020-

14,055, 14,327-14,340, 14,698-14,734, 14,778, 14,806, 15,010-15,016, 15,060-15,061). No evidence has been cited which would equal or outweigh this on the question of whether Northern New Jersey is a market separate and apart from the area then covered by Order No. 27.

16. There is testimony indicating the following:

(a) It would be impractical to subject a milk dealer's entire business to regulation if just a small part of it was in the marketing area, and it would not be right to force into the pool or out of the market an outside dealer with a route which had extended into the area for a long time (P.H.R. 13,786-13,792, 14,170), but with compensatory payments such a dealer would not be driven from the market (13,993-14,004).

(b) A market pool can not exist without compensatory payments, "as they are currently in Order 27" (14,173-14,174).

(c) In the opinion of expert witnesses, the Order No. 27 compensatory payments are reasonable, fair, and equitable, and should be extended to Northern New Jersey (12,998-12,999, 14,658, 15,020).

17. There is testimony in the record of the following:

(a) The purpose of compensatory payments is to see that unregulated plants selling milk within the area pay at least as much as regulated plants; to protect handlers and producers against cut rate milk; to give equality of opportunity; and to permit, by partial regulation, an outside dealer selling milk both in and out of the area to operate on an equal footing with fully regulated dealers (P.H.R. 15,020-15,029, 15,240-15,244).

(b) In the Allentown-Easton-Bethlehem, Pennsylvania, area, production is pretty well balanced with Class I requirements, and dealers there do not lay off producers nor divert any surplus in the flush season to Order No. 27 (15,324).

(c) There should be no compensatory payment if an outside dealer pays a price equal to or higher than that required of a regulated handler (15,331-15,333).

(d) The competitive unregulated price of milk in and near Northern New Jersey is the Order No. 27 blend, or slightly higher (13,401, 14,107, 14,983-14,987, 15,240, 15,269, 15,346, 15,371-15,373, 15,544).

(e) Milk is bought for fluid use in the unregulated and semi-regulated areas in and near Northern New Jersey at slightly above the Order No. 27 uniform price (14,993).

18. A recommended decision, signed by the Deputy Administrator referred to in Finding 2, was published on May 11, 1957, in the Federal Register (22 F.R. 3318-3357). It is there stated that the decision is based upon the record made at sessions of the hearing held from June 18, 1956, to March 29, 1957. Among the findings are the following:

(a) The handling of milk in Northern New Jersey should be brought under Federal regulation by amendment of Order No. 27 to include such area (22 F.R. 3318).

(b) The Order No. 27 uniform price is the competitive price for milk for fluid use in the milkshed (22 F.R. 3319).

(c) The Order No. 27 compensatory payment would enable the outside dealer to return to his producers about the manufacturing value of the milk sold as fluid milk in the marketing area, but would not affect what he could return to his producers for the balance of his milk (22 F.R. 3331).

(d) The terms and conditions of the recommended order will tend to effectuate the declared policy of the Act (22 F.R. 3343).

19. The recommended order contained in the recommended decision included, in Section 927.3, Northern New Jersey as part of the marketing area (22 F.R. 3343), and, in Section 927.83, payments into the producer settlement fund under stated conditions, amounting to the difference between the Class I-A or Class II, as the case may be, and Class III prices, by outside handlers who dispose of Class I-A or Class II milk within the marketing area (22 F.R. 3355-3357).

20. The decision, signed by the Acting Secretary, was published on June 14, 1957, in the Federal Register (22 F.R. 4194-4236). It contains findings similar to those de-

scribed in Paragraphs (a), (b), (c), and (d), of Finding 18, at 22 F.R. 4195, 4196, 4208 and 4220, respectively, and the provisions described in Finding 19.

21. The order, signed by an Assistant Secretary, to become effective on August 1, 1957, was published in the Federal Register for July 2, 1957 (22 F.R. 4643-4659). It contains a statement that a "hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the New York-New Jersey milk marketing area", and a finding, based upon "the evidence introduced at such hearing and the record thereof," that the terms and conditions of the order, as amended, will tend to effectuate the declared policy of the Act. It contains the provisions described in Finding 19.

22. By a statement dated October 16, 1957, petitioner was billed for $4,711.40 as due to the producer settlement fund under Order No. 27 for "non-pool products" for August and September 1957. This sum is lodged with the Registry of the United States District Court for the Eastern District of Pennsylvania.

23. If petitioner had been fully regulated during August and September 1957, its obligations to the pool would have been greater than the amount stated in Finding 22.

## Proposed Conclusions

*Adequacy of Notice.* Petitioner claims that there were, in effect, two promulgation hearings, the first having been held under the original and two supplemental notices of hearing (Findings 3, 4 and 5), and the second under the notice of February 28, 1957 (Finding 10), purporting to amend the original and two supplemental notices to include a proposed comprehensive order. Petitioner asserts that evidence received before the Finding 10 notice can not be used to support a comprehensive order because such an order was not then proposed, and that evidence received thereafter can not be used because the 15 days required notice was not given. We agree in part but not in full.

It seems perfectly clear from the public announcement

(Finding 2) that no proposals for a comprehensive order would be considered. The notice (Finding 3) clearly contains no such proposal. Neither the June nor the September 1956 supplemental notices (Findings 4 and 5) alter this situation. Nor do the releases of January 1957 (Findings 6 and 7). Motions, objections, rulings, etc., at the hearing sessions confirm the situation. We do not see how there could be any legal doubt that evidence in support of a comprehensive order was inadmissible in these circumstances. This does not mean, of course, that the desirability of a comprehensive order could not be shown in support of a contention that there should not be a separate order. There was much testimony received for this purpose (Finding 11), but this did not make it admissible for a purpose outside the notice. It must be remembered that we do not have here a notice which is vague or might be construed one way or another, or to include "appropriate modifications thereof", but a notice from which the specific issue of a comprehensive order had been repeatedly excluded. The testimony was given, and cross examination was conducted, on this basis.

Respondent urges, correctly, that the area proposed to be regulated, the general type of regulation, etc., were always the same. The fact remains, however, that a comprehensive order could not legally result from any evidence received under a notice which excluded a comprehensive order. It might be argued that the lengthy cross examination by many lawyers—and others not lawyers—shows that the issues were thoroughly explored. But we could certainly not say that cross examination, especially by lawyers who understood the limitations of the notice, would have been the same if those limitations had not existed.

The notice of February 28, 1957 (Finding 10), amends the original notice (Finding 3), and indicates that the record both before and after February 1957 would be used for all purposes, including the issuance of a comprehensive order. This would retroactively change the situation after many days of hearing and thousands of pages of transcript. It would reverse public announcements of the Secretary of

Agriculture, a ruling made by the Secretary upon a motion certified to him, and a notice on procedure by an Acting Secretary. It would make action by the Secretary, an Acting Secretary, a Deputy Administrator, the Hearing Examiner, counsel, and witnesses, invalid, illegal, wrong, by presenting a situation different from that faced by them when the action was taken. This principle has many times been repudiated in decisions refusing to judge action taken by the Secretary, on the basis of a promulgation record, by new evidence (a new situation) in a 15-A proceeding. The repudiated principle is not fair, not realistic, not legal. It should not be applied here. The original notice was applicable until legally amended, and its amendment was not effective to make admissible retroactively any evidence inadmissible on any issue when received. If respondent can here use retroactive evidence to *support* the Order, then the hearing should be reopened to allow petitioner to present new evidence to *attack* the Order retroactively.

We conclude that no evidence received before March 5, 1957, can be used to support amendment of Order No. 27 to include any part of New Jersey in the marketing area.

The foregoing conclusion seems well established by the 1,483 pages of the promulgation transcript mentioned as having been read in Finding 11. The 2,400 pages not read, mentioned in Finding 12, could not serve to expand the published hearing notice, and as they could not be used to support the extension of Order No. 27 to New Jersey, they were not read for consideration in arriving at this decision.

We do consider the proceedings prior to March 5, 1957, available for other purposes, however, including a determination of the adequacy of the notice authorizing consideration of a single or comprehensive order (Finding 10). Petitioner contends that this notice is defective in failing to comply with the 15-day notice for a promulgation hearing required by the rules of practice (7 CFR 900.4). It alleges, correctly, that the Department considers such notice applicable to an amendment hearing also when there is a pro-

posal to add new territory, although a three day notice is legal for other amendment hearings.

As the notice to consider a new order to include parts of New York and New Jersey, or the extension of Order No. 27 to New Jersey, was published on February 28, 1957 (Finding 10), only five days before the next hearing session (Finding 9), petitioner's contention seems sound. Looking back now, in view of the delay from January 7 to February 4, February 18, and March 5 (Findings 6, 7, and 8), it would seem that a further delay to March 15 could have been provided to comply with notice requirements. But the record shows that unrest in the industry made fast action urgent, and there may have been other pressing considerations. Under these conditions, the failure to comply strictly with a required period of legal notice would seem to be a rather technical matter if it did not result in actual prejudice to some legal interest.

The problem of Federal regulation for New Jersey by a separate order or by extension of Order No. 27 had been discussed by the industry for years, and much of the testimony and argument at the hearing sessions before March 5, 1957, involved that issue (Finding 11). Two of the specific proposals in the original notice related to compensatory payments, a principal issue here (Last two sentences of Finding 3). About the only differences in the subject matter before and after the opening on March 5 were that thereafter a comprehensive order could result, and the specific terms of such an order were material, including the specific terms of Order No. 27 as applied to New Jersey. The specific terms of Order No. 27 had been material before, as applied to New York territory, and the merits of a comprehensive order had been admissible for a restricted purpose. So long as there was no retroactive effect given to prior evidence on the issue of including New Jersey in a single order, we do not think the change in the issues upon five instead of 15 days notice was of a character that would,

or did, deprive any interested person of opportunity to prepare for submitting or cross examining evidence or testimony.

We conclude that the notice published on February 28, 1957 (Finding 10), was legally sufficient to raise the issue of a comprehensive order including Northern New Jersey, either by a new order or by amendment of Order No. 27, for that part of the promulgation hearing held on and after March 5, 1957.

*Extension to New Jersey.* Probably the record before March 5, 1957, would be admissible on the question of whether there is a need for Federal regulation in Northern New Jersey, for that was a principal consideration involved in the proposal for a separate order in the notice as then effective. However, it is not necessary to go to the earlier sessions. Finding 14, based entirely upon evidence received after a single order was an unrestricted issue before the hearing, shows that the record completely justifies and supports the promulgation of some type of Federal regulation for Northern New Jersey.

Finding 15 shows that the record firmly supports the choice of a single or comprehensive order to cover the whole area, as against separate orders, this to be accomplished either by a new order or by amendment of Order No. 27, as proposed in the notice on and after March 5, 1957.

We conclude that the evidence received on and after March 5, 1957, in the promulgation hearing, legally authorizes the amendment of Order No. 27 to include Northern New Jersey, and that Section 927.3 of Order No. 27, as amended, effective August 1, 1957, is in accordance with law as to its inclusion of Northern New Jersey.

*Compensatory Payments.* On this issue, it is very important to keep in mind at all times just what the question before us is. It is not compensatory payments in general.

Of course, petitioner alleges that compensatory payments are not authorized by the Act, but for present purposes that is more or less *pro forma*, because at the hearing it limited its attack to the compensatory payment provisions *as extended to New Jersey*. It is affected by the extension only, not by what the provision was before August 1, 1957, and raises no contention one way or the other on its validity before that date. (Tr. [Record in this 15-A proceeding] 104-106, 112-117). But as to whether compensatory payment provisions in general are permitted by the Act, to conclude that they are authorized we need only cite a recent decision upholding one in the Cleveland Milk Order, *In re The Lawson Milk Company*, 17 A.D. 239 (April 1958).

Our question is whether the 1956-1957 promulgation record supports section 927.83 *as it applies to Northern New Jersey*. The testimony referred to in Finding 16(a) and (b) would show that compensatory payment provisions are desirable, even necessary, although we might question the quoted phrase if it means that no other version of compensatory payment provisions than those then in Order No. 27 would allow a market pool to exist. If there were no conflicting evidence, we think such expert opinion as is mentioned in Finding 16(c) would support the extension to new territory of a provision of an existing order. To be specific, statements of expert witnesses that section 927.83 is reasonable, fair, and equitable and should be extended to Northern New Jersey, if not contradicted, would authorize its extension to Northern New Jersey. But they are contradicted.

According to the cited available evidence in the promulgation record, outlined in Finding 17, the price at which unregulated milk is available around Northern New Jersey is not the Class III price, but the uniform price or slightly higher. This brings the measure of the payment specified by section 927.83 squarely within the ruling of the court in *Kass* v. *Brannan*, 196 F. 2d 791 (CCA 2, 1952), *cert.*

*denied*, 344 U.S. 891, holding invalid a compensatory payment provision. On this authority, we conclude that section 927.83, *as it applies to Northern New Jersey*, is not in accordance with law, and that billings made against petitioner pursuant to that provision in connection with milk disposed of in Northern New Jersey should be canceled.

This should not be taken as a ruling, or even an inference, that this section is defective in any way as it applied, and applies, to the marketing area of Order No. 27 as it existed before August 1, 1957. It is quite possible—indeed, we think it is probable—that the section is supported by the record upon which it was first based. That record, however, was not before the Secretary as a part of the record upon which Order No. 27 was extended to Northern New Jersey, and is not before us now. Contentions of the respondent here, and discussion of compensatory payments in the recommended decision and in the decision to extend Order No. 27 to New Jersey, indicate that the 1953 record, although not legally available, may have been considered. If so, it should not have been, particularly after refusal to incorporate old records into the 1956-1957 record.

In view of our holding that the compensatory payment provisions do not apply to the petitioner, there is no basis for considering the evidence offered concerning the exemption of petitioner from those provisions.

We think the many contentions of the parties on various details are all so closely related to what we have considered the three chief issues, that our ruling on these chief issues disposes of those contentions. Of course, any arguments, requests, motions, etc., inconsistent with the conclusions here reached are denied or over-ruled.

### *Proposed Order*

The Market Administrator of Order No. 27 shall cancel all billings made to petitioner pursuant to section 927.83

of the order for milk distributed by petitioner in Northern New Jersey.

Copies hereof shall be served on the parties or their counsel of record, on the intervenors or their counsel, and on the Market Administrator of Order No. 27.

Note: The foregoing is the examiner's report, or recommended decision. It is not a final order. The final order will be issued by the Judicial Officer after the parties have had opportunity to file exceptions, etc., as provided by the rules of practice.

The parties will have until August 30, 1958, to file exceptions to this report, briefs on the exceptions, and requests for oral argument.

JACK W. BAIN,
*Hearing Examiner.*

August 6, 1958.

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-123

In re: LEHIGH VALLEY COOPERATIVE FARMERS, PETITIONER

EXAMINER'S REPORT

*Preliminary Statement*

This is a proceeding under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), which regulates the handling of milk in the New York-New Jersey metropolitan area. The proceeding was instituted by a petition filed on August 1, 1957, by Lehigh Valley Cooperative Farmers, of Allentown, Pennsylvania, a milk dealer, or handler, which distributes some of its milk in the area covered by Order No. 27.

Except that the oral hearing in this proceeding was held on October 24, 1957, and that the denial of interim relief is at 16 A.D. 873, the issues, counsel, procedure, etc., herein are the same as those in AMA Docket No. 27-121, *In re Suncrest Farms, Inc.*, in which the Examiner's Report is issued this day. Reference is made to the Preliminary Statement in that Report for a statement of the procedure, etc., herein.

*Proposed Findings of Fact*

1. Lehigh Valley Cooperative Farmers, the petitioner, of Allentown, Pennsylvania, is a corporation incorporated under the Cooperative Laws of Pennsylvania. It is a handler as that term is defined in Order No. 27.

Proposed Findings 2 through 21 in the Examiner's Report in AMA Docket No. 27-121, mentioned above in the Preliminary Statement, are adopted as Proposed Findings 2 through 21 herein.

22. By a statement dated October 18, 1957, petitioner was billed for $39,444.03 as due to the producer settlement fund under Order No. 27 for "non-pool products" for August

and September 1957. This amount has been paid to the Registry of the United States District Court for the Eastern District of Pennsylvania.

*Proposed Conclusions and Order*

The Proposed Conclusions and the Proposed Order in the Examiner's Report in AMA Docket No. 27-121, mentioned above, are adopted as the Proposed Conclusion and the Proposed Order herein.

The parties will have until August 30, 1958, to file exceptions to this report, briefs on the exceptions, and requests for oral argument.

JACK W. BAIN,
*Hearing Examiner.*

August 6, 1958.

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-121

In re: SUNCREST FARMS, INC., PETITIONER

RESPONDENT'S EXCEPTIONS TO HEARING EXAMINER'S REPORT

Respondent respectfully excepts to the report of the presiding officer in the following respects:

1. Respondent excepts generally to the report in that the report fails to recognize that this is a quasi-judicial limited review proceeding and that the order provisions and proceedings being reviewed were quasi-legislative and not quasi-judicial in nature. The examiner has failed to review the full findings and conclusions of the Secretary, contained in the Secretary's final decisions which underlie the provisions in question, on a proper basis of review and has, instead, erroneously substituted his own judgment for that of the Secretary. The report should have found that the findings and conclusions of the Secretary, and the provisions in question, were supported by substantial evidence and were and are lawful.

2. The report erroneously restricts review to that part of the 1956-1957 hearing which followed March 5, 1957. The whole 1956-1957 hearing record properly underlies and supports the order, as amended, and the examiner should have considered the additional portions of that record cited to him and referred to in findings 11 and 12. Also relevant for review herein are the decisions of the Secretary and their supporting hearing records, upon which the disputed provisions of Order No. 27 were issued, amended, or ratified before their partial amendment in 1957 and they too should have been considered. Specifically, the 1953 decision and record which were proffered by the respondent were erroneously excluded from the 15(A) record (R92-117). Respondent's objection to their rejection is hereby re-

newed and such material is hereby reoffered by way of official notice or adoption by reference.

3. The report erroneously rules or implies at pages 2 and 19 that evidence taken in this 15(A) proceeding concerning petitioner's operations and how it is affected by order provisions was properly received for the purpose of determining whether petitioner should be "exempted" from order provisions. The respondent's objection to the receipt of such evidence for this purpose is renewed.

4. Respondent excepts to the failure to include in finding No. 3 on page 4 other relevant proposals in the hearing notice of May 25, 1956, including but not limited to various proposals relating to delineation of the New Jersey area proposed for expanded Federal regulation, pool plant designation and qualification, and how to deal with fringe dealers, and a number of proposals to provide for compensatory payments in addition to the one adverted to in finding No. 3. More specifically, respondent excepts to the failure to include in finding No. 3 the proposal by Mutual Federation of Independent Cooperatives, Inc. to include in the regulatory program for Northern New Jersey a compensatory payment provision identical with that then effective in Order No. 27 and the failure to find that such proposed provision was always before the hearing for consideration and was in fact ultimately included, with suitable modifications, in the regulatory order covering Northern New Jersey, complained of by the petitioner.

5. Respondent excepts to the examiner's failure to find that the Final Decision of the Secretary accurately described the hearing issues as follows:

> "The material issues presented are concerned with:
>
> "I. Whether the handling of milk in additional territory in the States of New York and New Jersey (outside that currently regulated under Order No. 27) should be subject to Federal regulation, and if so:
>
> "1. What the boundaries of such additional territory should be.

"2. Whether such additional regulation should be by means of (a) a separate new milk marketing order for Northern New Jersey as a separate marketing area and expansion of the present marketing area under Order No. 27 to include additional territory in Upstate New York, or (b) a single milk marketing order applicable to a single marketing area including the present Order No. 27 marketing area together with additional territory in Northern New Jersey and Upstate New York, and if by means of such a single order, (c) whether it should be accomplished by issuance of a new milk marketing order or by amending Order No. 27, and

"II. What the terms and provisions of such new or revised regulation (*either by means of separate orders or under a single order*) should be with respect to (1) the scope of regulation, (2) the classification of milk, (3) class prices and differentials, (4) distribution of proceeds to producers, and (5) administrative provisions, the issues with respect to such terms and provisions being more specifically defined hereinafter." (Emphasis supplied).

6. Respondent excepts to the erroneous conclusion that as to Northern New Jersey there were two completely separate hearings, wholly insulated from each other, before and after March 5, 1957. Respondent further excepts to the examiner's failure to recognize, find and conclude, as to Northern New Jersey, that the substantive regulatory issues which were noticed and opened up for hearing by the original hearing notice were properly considered and heard throughout the entire hearing and that the March 5, 1957 expansion notice did not initiate a wholly new and completely separate proceeding, but merely expanded the scope of the existing hearing to include consideration of an additional alternative to better effectuate the proposals always under consideration and to more effectively carry out the purposes of the act. The relevant issues in this

15(A) review proceedings relate to the lawfulness of the substantive order provisions herein attacked and not to the different issue of whether those provisions should have been a part of a comprehensive or of a separate order. Their impact on petitioner would be the same in either case.

7. Respondent excepts to the argument at pages 13-14 of the report that the situation in the 1956-1957 hearing, before and after March 5, 1957, is similar in principle of that of a (15)(A) quasi-judicial review of a prior promulgation proceeding for an order or amendment. Obviously there is no parallel whatever. Exception also is taken to the erroneous argument concerning alleged "retroactivity."

8. Respondent excepts to the failure of the hearing examiner to follow the rule of law set forth in *United States* v. *Wrightwood*, 127 F. 2d 907, as to the exploratory and flexible nature of a quasi-legislative rule making proceeding.

9. Respondent excepts to so much of pages 14-16 of the report as may cast any question on the lawfulness and sufficiency of the February 28, 1957 notice.

10. As to findings 14, 15, 16 and 17 respondent excepts to the failure of the examiner to consider other very substantial evidence cited to him in respondent's brief, and reflected throughout the extensive findings and conclusions of the Secretary in his final decision. Respondent further excepts to the selected, limited and slanted content of findings 14-17 including the failure to refer to substantial evidence in the record after March 5, 1957, which in itself adequately supports the contested provisions and some of which is more particularly set forth in the exceptions filed by the intervenors herein.

11. Respondent further excepts to finding 17 as no finding at all but merely a recital of "evidence." To the extent that the report later concludes that these "findings" are conclusive they are excepted to as erroneous, inaccurate, misleading, irrelevant, not required to be found on the whole record, and an erroneous substitution of the examiner's judgment for that of the Secretary.

12. Respondent further excepts to finding 17(b). As in-

dicated in the Secretary's final decision (22 F. R. 4194, 4197) the record showed that five non-pool plants in the Allentown-Easton area receiving milk from 1200 farmers had only 72% of their receipts in fluid uses, the balance of 28% therefore being surplus to such fluid uses. The same section of the Secretary's decision reflects evidence showing that other unregulated plants in Pennsylvania and elsewhere in the milkshed had surplus milk in varying degrees.

13. Respondent excepts to the erroneous and fragmentary findings, express or implied, in finding 17(a) and 17(c) as to the alleged purposes of compensatory payments.

14. Respondent excepts to the failure of the report to confirm or give weight to the following finding in the final decision of the Secretary (22 F. R. 4194, 4202):

> "*New or Amended Order.* On the question of whether a single marketing order should be issued in the form of an entirely new marketing order or by amending Order No. 27, it is concluded that the existing provisions of Order No. 27 constitute a suitable framework for appropriate regulation for the expanded area under a single order. Findings and conclusions are set forth elsewhere herein regarding terms and provisions of the order which should be amended and with respect to provisions which should be added to provide appropriate regulation for the expanded area. The provisions of Order No. 27, which over a period of nearly 20 years have proved to be satisfactory both from the standpoint of attaining the principal objectives of regulation and from the standpoint of administration, should not be abandoned or ignored."

15. Respondent excepts to the erroneous, fragmentary and misleading summary, in findings 18(c) and 20, of the findings and conclusions of the Secretary concerning "Pool plants and compensatory payments" which appeared under that subheading in the Secretary's final decision at 22 F. R. 4194, 4205-8. Respondent particularly excepts to the ex-

aminer's disregard of the following relevent portions thereof:

"Issue No. II

(Terms and Provisions)

"In view of the findings and conclusions on Issue No. 1, the material issues relating to terms and provisions are concerned with amending the existing terms and provisions of Order No. 27 relating to the following:

"1. Conditions under which milk is to be fully subject to the pricing and pooling provisions of the order (pool plant provisions), and provisions applicable to milk disposed of in the marketing area from sources not fully subject to pricing and pooling under the order (peripheral milk and compensatory payments).

• • • • •

"Findings and conclusions with respect to these issues are as follows:

"1. *Pool Plants and Compensatory Payments.* The basic features of the present pool plant provisions of the order should be retained but should be modified to provide that:

• • • • •

"f. Any plant at which milk is packaged and from which such milk is distributed in the marketing area, but which does not otherwise qualify as a pool plant, may at the option of the handler operating such plant be a pool plant in any month in which 55 percent or more of the milk received at such plant directly from farmers is classified in Class I-A or Class I-B, except that for a plant which otherwise would be subject to the provisions of another Federal order, the option of being a pool plant under this order could be exercised only if the percentage of its milk in Class I-A

exceeds the percentage of its milk in Class I-B disposed of in the marketing area defined under the other Federal order.

"Pool plant provisions of the order provide for identification of and determination by the market administrator of those plants at which milk received from farmers is to be fully subject to the pricing and pooling provisions of the order as distinguished from those plants at which milk received from farmers is to be entirely unregulated or is to be partially regulated by being subject to compensatory payments in the event of fluid disposition in the marketing area. All milk received from producers at pool plants is classified, priced and included in the computation of the uniform price. Handlers are subject to payments into or out of the producer settlement fund. Those handlers with a large percentage of fluid milk sales outside the marketing area try to keep such milk from being pooled to avoid payments into the producer settlement fund, and those with a high percentage of their milk in manufacturing uses frequently want such milk pooled in order to be able to receive payments from the producer settlement fund.

"Compensatory payments are payments to the producer settlement fund on milk disposed of in the marketing area from plants which are not pool plants. They are designed to bring substantial equity between the handler and producer of pool milk and the handler and producer of non-pool milk with respect to sales in the marketing area. The provision for partial regulation through compensatory payments makes it possible for a handler operating outside the marketing area to use the facilities of fully regulated plants for disposing of surplus milk not needed for markets outside of the area without imposing the financial burden of such surplus on producers in the marketwide pool. Compensatory payments also make it possible for a handler outside

the marketing area to maintain small amounts of regular sales in the marketing area without subjecting his outside sales to full regulation.

"One objective in drawing boundary lines of the marketing area is to minimize the amount of sales in the area from distributors whose primary business is outside of the area, and also to minimize the amount of distribution outside of the marketing area from plants located within the area whose business is primarily within the marketing area. Complete elimination of such competition, however, is impossible for the New York-Northern New Jersey area regardless of where the line is drawn. As a result, there will be located outside of the marketing area a number of handlers who primarily are supplying customers outside of the marketing area but who historically have served a few customers located within the area. These handlers usually have a relatively high percentage of their milk in fluid milk utilization. To the extent that they are selling milk within the area, they are competing for sales with handlers located within the area who are fully regulated by the order with respect both to pricing and pooling. Outside of the area, they are competing for sales primarily with handlers located outside of the area who are not regulated by the order. Such handlers located near the borders of the proposed marketing area who receive milk directly from farmers compete for producers with fully regulated handlers some of whose plants are located within the boundaries of the marketing area. Some of such handlers operating plants in the marketing area also have a fluid milk utilization considerably higher than the average utilization for the market as a whole.

"Requiring such outside handler to be fully regulated would mean that he would be required to account to the pool at the full Class I-B price for all the milk sold outside of the marketing area which is in competition

with milk not subject to regulation under the order. Such a requirement for a dealer, whose business primarily is outside of the marketing area, could readily induce him to abandon his sales in the marketing area. Permitting a handler to continue to sell milk to customers in the marketing area without any form of price regulation would give such handler a competitive advantage as compared to the handler whose primary business is within the area and who consequently is fully regulated.

"A proposal was made that such handler outside the marketing area be required only to pay to his producers the utilization value of milk according to the class prices established under the order. That is, that he be required to pay for his milk on a handler pool basis rather than on a marketwide basis. It was contended that such a provision would provide equality between the pool handler and the nonpool handler because their required class prices would be the same. The handler in the area, however, has to equalize his utilization with other handlers, and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than the utilization of his handler. It would be inequitable to a handler in the marketing area to require him to equalize his utilization while letting a handler outside the marketing area avoid equalization on milk sold in the area. An unfair advantage would accrue to the nonpool handlers in competition for producer supplies, and the entire program of marketwide equalization would be in jeopardy. Although it is not the purpose of the order to bring complete equality between regulated and unregulated handlers, it should at least provide equity between such handlers with respect to milk sold in the marketing area both as to class prices and as to payments to producers.

"Another proposal made was that the handler outside the marketing area be required to pay full compensatory payments provided for under the order on nonpool milk sold in the marketing area. This would return to such handler a price which would enable him to pay his producers for that particular milk sold in the marketing area about what he could pay if he sold such milk to a manufacturing outlet. It would not, however, affect what he could return to his producers for the balance of his milk. In order not to give the handler located outside the marketing area and distributing a small amount of milk in the marketing area an advantage over the fully regulated handler, and at the same time, to avoid placing such handler the major portion of whose sales is outside of the marketing area in competition with unregulated milk, at an undue disadvantage with his major competition, the order should provide that the outside handler have a choice of either pooling his entire receipts or of paying the full compensatory payment on his sales within the marketing area. The fully regulated handler in the marketing area is protected in either case, and the handler outside the marketing area is placed in a position of selecting whichever alternative is more favorable in his particular situation. Unless safeguarded, there is danger of this provision constituting a means of pooling surplus milk for other markets through token sales to the marketing area. Accordingly, only those handlers disposing of a substantial percentage of their milk for fluid use should be eligible to exercise the option of being fully regulated. Inasmuch as handlers, not presently regulated under the order and who distribute milk in the marketing area from plants outside the area, have relatively high fluid utilization a percentage requirement of 55 percent in Class I (Class I-A and I-B combined) will not disturb the status of handlers currently selling small amounts of milk in the

marketing area, but will eliminate the danger resulting in token sales in the marketing area from plants not engaged primarily in the distribution of fluid milk.

"This option should not constitute a means by which plants otherwise regulated under another Federal order could jump back and forth between orders to obtain advantages over other handlers under one or both orders because of temporary price differences or to take advantage of differences in pooling provisions of the order involved. Accordingly, the operator of a plant which except for this option would be regulated under another Federal order should be eligible to exercise the option only if the percentage of its milk in Class I-A exceeds its percentage of Class I-B milk disposed of in the marketing area defined under the other Federal order.

• • • • •

"Exceptions were taken to failure to eliminate provision for compensatory payments pursuant to the proviso of Sec. 927.83(b)(1). In support of the exception it was contended that the circumstances under which provision was made in 1953 for such payments (and the companion provision of Order No. 61) no longer exist primarily because of the marketing area expansion herein provided. It is found, on the contrary, that expansion of the marketing area or other changed conditions does not eliminate the need or basis for such payments. Discontinuance of provision for such payments would invite the resumption of practices and consequences prevailing prior to adoption of such provision. The factual situation most material in this connection is that the provision continues for market-wide pooling under Order No. 27 and for individual handler pooling under Order No. 61. Accordingly, such exceptions are denied."

RESPONDENT'S EXCEPTIONS (RE SUNCREST)

16. Respondent excepts to the failure and refusal of the examiner to consider, review and sustain the relevant findings, conclusions and statements of principles and expertise, set forth in the Secretary's decision of December 14, 1953 (18 F. R. 8444) under "Issue No. 1" dealing with the contested provisions of Order No. 27. Such findings, conclusions and statements of principles and expertise were generally ratified by the Secretary in issuing the further amendments to Order No. 27 complained of by petitioner. Because of its length the relevant text thereof is not set forth in these exceptions in full but is incorporated by reference as if fully stated herein.

17. Respondent excepts to the failure of the report to include the findings and conclusions of the Secretary supporting specific marketing area boundary lines (22 F. R. 4202 *et seq.*). The fixing of such lines is closely related and relevant to the problem of complete or partial regulation of fringe dealers.

18. Respondent excepts to the erroneous and misleading statement or implication in finding 18(b) and 19 that the Secretary's decision at 22 F. R. 4194, 4196, found that the Order No. 27 uniform price is the competitive price for Class I use of milk in the milkshed, and the failure to state the true text thereof as follows:

> "The need for regulation in additional territory as proposed depends in considerable measure on the milk production and marketing conditions which have developed under the regulation which has been in effect. Some of such conditions are as follows:
>
> "(1) The Order No. 27 minimum uniform price has become the minimum competitive price for all milk *eligible* for fluid use produced in the milkshed. Unregulated plants must pay at least this minimum price to their producers or the producers will shift their deliveries to a regulated plant. Unregulated plants with a fluid outlet for only a relatively small proportion of their supply have the choice of increasing their

fluid sales outside the marketing area or of getting into the pool (if necessary by fluid sales in the marketing area) as a means of continuing to pay a competitive producer price.

* * * * *

"(3) Milk produced under the conditions which permit its use only for manufacturing purposes has practically disappeared from the milkshed. The uniform price has been enough higher than the value of milk for manufacturing so that substantially *all dairy farmers in the milkshed* already have made the necessary investments to improve their production facilities and have taken other steps necessary to meet *requirements* of various health authorities for the production of milk for fluid use." (Emphasis supplied.)

19. Respondent excepts to the failure of finding No. 19 to correctly state the true and complete nature of the full order provisions in question, including the fact that such provisions provide an option to be fully or partly regulated. The full text of the provisions should have been included in finding 19 and reviewed.

20. Respondent excepts to the failure of the report to include a finding that under the order petitioner had the election or option of being wholly regulated and pooled or of being partially regulated and elected partial regulation as a matter of its own free choice. Further, that petitioner now cannot be heard to complain thereof.

21. Respondent excepts to the failure of finding 23 to specify precisely and fully the extent of petitioner's pecuniary advantage in being partly regulated as against full regulation. Finding 23 neither specified the extent of the different obligations to the pool nor does it consider the additional impact of administrative assessments on petitioner if fully regulated.

22. Respondent excepts to the erroneous conclusion at page 17 of the report that the substantial evidence of record

there referred to, and admittedly clearly supporting the provisions here under attack, was overcome, as a matter of law, by other alleged evidence in the record. Respondent excepts to the examiner substituting his own judgment for that of the Secretary.

23. Respondent excepts to the entire paragraph at the top of page 18 of the report, which contains the end conclusions that the order provisions in question are unlawful and the billings against petitioner would be cancelled. The entire paragraph is erroneous. More particularly it is erroneous in that the examiner:

a. completely overlooked the self evident fact that the uniform price paid to farmers is an average price—not a price or value for each use of the milk acquired. The "flat price" paid to producers for milk automatically takes into consideration the lower value to be obtained from surplus milk that must be disposed of other than in fluid channels.

b. completely overlooked the normal and self-evident existence of some surplus in milk so purchased, which surplus is eligible for sale in the regulated market for Class I use, thus obtaining the difference between its normal value as surplus and the Class I value. For instance 28% of the milk received by handlers in Allentown-Easton area was surplus.

c. completely overlooked the facts of record demonstrating the existence of substantial quantities of surplus milk in the milkshed at the nonpool plants which pay their farmers the Order No. 27 uniform price or higher. Milk for all Class I uses and for fluid cream in the marketing area accounted for 55% of receipts from producers in 1956. Thus 45% of such receipts was surplus.

d. failed to consider the true and complete principles, expertise, reasons, bases, need and justification for the provisions in question, including those set forth in the 1953 and 1957 decisions of the Secretary relating thereto, which should be sustained and adopted herein as well as the detailed discussion of the Judicial Officer in *In Re: The Law-*

*son Milk Co.*, 17 A. D. 239 particularly pp. 254, 256, 258, 259 and 260.

e. failed to find and conclude that the provisions here in question constitute a lawful partial exemption or relief from clearly lawful complete regulation, pricing and pooling, and that petitioners had the complete and perfect option of being regulated to the latter extent but rejected such option.

f. erroneously failed to distinguish the inapplicable case of *Kass* v. *Brannan*, 196 F. 2d 791, but instead incorrectly relied wholly upon it.

g. failed and refused to sustain the order provisions complained of pursuant to the clearly controlling decision of the Judicial Officer in *In Re: The Lawson Milk Co.*, 17 A. D. 239 (April 1958).

24. Respondent excepts to the examiner's proposed order in its entirety.

*Request for Oral Argument*

In view of the important issues here presented and the grave consequences to effective regulation if the erroneous report of the examiner is allowed to stand, oral argument before the Judicial Officer is requested. Because certain common findings and conclusions have been issued in this proceeding and in AMA Docket Nos. 27-120, 27-122 and 27-123, and, because the same counsel represents the parties in all these proceedings consolidated oral argument is suggested on the questions common to all such cases.

Respectfully submitted,

JOHN M. DURBIN,
*Attorney for Respondent.*

RESPONDENT'S EXCEPTIONS (RE LEHIGH VALLEY)

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-123

In re: LEHIGH VALLEY COOPERATIVE FARMERS, PETITIONER

RESPONDENT'S EXCEPTIONS TO HEARING EXAMINER'S REPORT

1. Respondent excepts to the entire report of the examiner in this proceeding because the following statement is wrong:

> "Except that the oral hearing in this proceeding was held on October 24, 1957, and that the denial of interim relief is at 16 A.D. 873, the issues, counsel procedure, etc., herein are the same as those in AMA Docket No. 27-121, *In re Suncrest Farms, Inc.*, in which the Examiner's Report is issued this day."

It is the position of the respondent that § 927.83 of the New York—New Jersey order taken together with §§ 961.43, 961.70 and 961.80 of the Philadelphia Order in effect prior to February 1, 1958, are mutually complementary when applied to the same handler and to the same milk as is the case here. Payment for the milk in the manner prescribed by § 927.83 neither increases nor decreases the amount for which the petitioner must accecount to the market administrator for milk disposed of in each of the respective marketing areas. Accordingly, there is no rate or penalty charge involved and, therefore, is not controlled by the court's decision in *Kass* v. *Brannan*, 196 F. 2d 791 (CCA 2, 1952), cert. den. 344 U. S. 891, as held by the Examiner but falls squarely within the holding of the *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939) in which it was held that a handler, including a cooperative association which is also a handler, has no financial interest in the producer settlement fund, and therefore, has no standing to challenge the distribution of money to producers.

The Examiner in his report, entirely failed to deal with

the real issues in this proceeding. In fact, in his report, *In re: Suncrest Farms, Inc.*, AMA Docket No. 27-121, which he adopts in this proceeding, he attempts to dispose of all the issues in both cases as follows:

> "We think the many contentions of the parties on various details are all so closely related to what we have considered the three chief issues, that our ruling on these chief issues disposes of those contentions."

How this disposes of the fact that petitioner is a handler under the Philadelphia Order; that the Philadelphia Order by § 961.43 fixes the price at which a handler must account for Class I milk disposed of in the New York—New Jersey marketing area at the Class I-A price computed pursuant to the New York—New Jersey Order less such payment as is required on such milk pursuant to the Philadelphia Order; and that there is no penalty on such milk we are unable to comprehend.

Section 927.83(b)(1) and (2) of the New York—New Jersey Order fixes the price at which a handler must account for such milk (1) at the difference between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price adjusted for butterfat test and the location of the plant where such milk is first received from farmers under the New York—New Jersey Order and (2) at the New York—New Jersey Class III price under the Philadelphia Order. Thus, the value of such milk is divided between Philadelphia and New York—New Jersey by accounting to the market administrator for Philadelphia at the New York—New Jersey Class III price and receiving a credit at said Class III price and paying the balance into the New York—New Jersey Producer Settlement Fund.

Thus, the real basic issue raised in this proceeding, which the Examiner did not even consider, is whether the milk of a cooperative handler can be pooled. This issue was decided in the *Rock Royal* case, *supra*, and needs no further comment. Under the present New York—New

Jersey Order, § 927.29(d), petitioner was given the choice of being fully pooled or partially pooled at its option. By its own action it made itself subject to the Philadelphia Order (0-61) and thus became subject to partial pooling under the New York—New Jersey Order.

The Examiner then adopts his proposed findings, 2 through 21, *In Re*: *Suncrest Farms, Inc.*, AMA Docket No. 27-121, as his proposed findings herein. The following proposed findings of fact have no bearing upon this proceeding for the reason set out above:

Proposed Finding No. 17(a), (c), (d) and (e)
Proposed Finding No. 18(b) and (c)
Proposed Finding No. 19
Proposed Finding No. 21

The Examiner failed to make proposed findings applicable to this proceeding or to reach any proposed conclusions upon the issues raised in this proceeding. He merely states that his proposed findings in Proposed Finding No. 17 "brings the measure of the payment specified by § 927.83 squarely within the ruling of the court in *Kass* v. *Brannan*, 196 F. 2d 791 (CCA 2, 1952), cert. den. 344 U.S. 891, holding invalid a compensatory payment provision." This is just not true as the measure here is the order price which is merely divided between the New York—New Jersey and Philadelphia markets.

A proper decision in this proceeding requires findings of fact based upon the record in this case and conclusions based upon those facts. The validity of the provisions of an order regulating a market as complex as the New York—New Jersey market cannot be decided upon broad general principles when they are purposely designed to cover problems peculiar to that market such as the various types of payments into the Producer Settlement Fund under §§ 927.83 and 927.84 loosely designated "Compensatory Payments."

There seems to be no particular virtue in rewriting our

brief in this proceeding as it would be mere repetition, but it is our contention and has been from the time this proceeding was filed that it could not be tried or decided except upon the record pertaining to this proceeding.

Respondent excepts to findings 2-22 of the report, adopted by reference from findings 2-22 adopted by the Examiner from his report of August 6, 1958, in AMA Docket No. 27-121, and the conclusions drawn therefrom by him for the same reasons as set out in Respondent's exceptions to the Examiner's report in Docket No. 27-121 and hereby adopts such exceptions the same as if set out in full herein.

Because of the important nature of the issues presented and the common proposed findings and conclusions excepted to in the instant case and in AMA Docket Nos. 27-120, 27-121 and 27-122, oral argument before the Judicial Officer is requested upon all four cases.

JOHN M. DURBIN,
*Attorney for Respondent.*

PETITIONERS' EXCEPTIONS (RE SUNCREST–LEHIGH VALLEY)

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-121

In re: SUNCREST FARMS, INC.

AMA Docket No. 27-123

In re: LEHIGH VALLEY COOPERATIVE FARMERS, PETITIONERS

PETITIONERS' EXCEPTIONS

I. It is suggested that the last sentence of Page 2 of the Preliminary Statement in support of the proposed Order of Hearing Examiner Jack W. Bain be revised. It now reads:

> "In view of this statement, and because the earlier promulgation record was *refused admission* as a part of the promulgation record for the 1957 amendments, the Hearing Examiner sustained the objection."

The Hearing Examiner sustained the objection of the Petitioners to the request of the Respondent that official notice be taken of the 1953 record for two reasons:

First, the compensatory payment provisions prior to August 1, 1957, were not in dispute; and

Second, the 1953 record was not incorporated in the 1956-1957 record and, therefore, was not before the Secretary.

It is respectfully suggested that the statement would be more accurate if it read as follows:

> "In view of this statement and because the earlier promulgation record was not made part of the promulgation record for the 1957 amendments, the Hearing Examiner sustained the objection."

The last sentence on page 18, for the reasons just above stated, we respectfully submit should read as follows:

> "If so, it should not have been, particularly as the old records were not incorporated into the 1956-1957 record."

The Hearing Examiner stated in the last paragraph on page 18 that the old record probably supported compensatory payments prior to August 1, 1957. We suggest that this is a gratuitous statement, inasmuch as the record was not before the Hearing Examiner.

II. The Petitioners except to the findings of the Hearing Examiner stated in the last sentence of paragraph 15 of his Proposed Findings of Fact, inasmuch as it is the Petitioners' conviction that the evidence against including Northern New Jersey as a part of a single marketing order far out-weighed the evidence in favor of a single order. The factual testimony against a single order, even though less in volume, should have been more convincing than that in favor of a single order.

III. While this is not particularly an exception, Petitioners should like to make this observation, that while testimony does appear in the record as set forth by the Hearing Examiner in 16(a), (b) and (c), it was very successfully contradicted as was later found by the Hearing Examiner.

IV. The finding of the Hearing Examiner in 17(d) is correct, but it is suggested that the testimony conclusively proves that the Petitioners, Pennsylvania dealers, paid a price much higher than the blend price of Order No. 27 and higher than the Class IA and Class IB price of Order No. 27. The same is true with reference to the finding stated in 17(e).

V. The finding of the Hearing Examiner, paragraph 18, is not one to which we except, but should like to point out that it compels the conclusion that the Secretary in the promulgation of Order No. 27, to be effective August 1, 1957, depended and relied upon the whole record of the hearing held June 18, 1956 to March 29, 1957, making it impossible to determine whether he would have promulgated such an Order if he had before him only the record after March 5, 1957.

The finding of the Hearing Examiner, Paragraph 18(b), states what the Deputy Administrator held, but the Hearing Examiner properly found that the testimony did not

warrant that finding; hence, this is not an exception, but a further observation.

The finding of the Hearing Examiner in Paragraph 18(c), properly relates what the Deputy Administrator said, and while we do not except to this finding, so far as it relates to the Deputy Administrator's statement, Petitioners should like to observe that it is meaningless unless the Deputy Administrator is attempting to say that producers shipping to a non-pool plant which sells milk in the marketing area should be satisfied with the Class III price. At no place does the record warrant such a conclusion.

VI. The Petitioners should like to point out that the first sentence of the second full paragraph of page 13 of the Examiner's proposed Conclusions renders Order No. 27 effective August 1, 1957, insofar as it affects Northern New Jersey, completely invalid. The Secretary stated in his notice of February 28, 1957, that the record established before and after February, 1957 would be used for all purposes. His decision and findings in support of Order No. 27 in no wise changed his position. Therefore, it must be concluded that he used the entire record established from June 18, 1956 through March 29, 1957.

The Hearing Examiner properly concluded that no evidence received before March 5, 1957 could be used to support amendments to Order No. 27 to include any part of New Jersey. The Petitioners, however, except to the Hearing Examiner's conclusion found in the last paragraph of page 14. The record prior to March 5, 1957 could not be used for any purpose whatsoever and certainly could not be used for the purpose of explaining away an illegal and inadequate notice.

Petitioners except to the last part of the first paragraph of Page 15, where the Hearing Examiner found that there was unrest in the industry prompting fast action, and his finding that there may have been other pressing considerations. If unrest called for fast action, the Secretary should have called an emergency hearing and should not have entertained the long recess periods.

An objection to proper legal notice is never a technical matter, but is a fundamental matter. A hearing held with inadequate and illegal notice is void per se. Any other position puts thousands of producers and hundreds of handlers in a very disadvantageous position. The Government did not need to move with that speed on such important questions, and did not indicate throughout the hearing and long recess periods that such speed was necessary.

The Hearing Examiner in the last paragraph of page 15 refers to the length of time that a single order or the extension of Order No. 27 had been discussed by the industry. This is true. However, it cannot be overlooked but must be noted that the Secretary, as a result of this long period of discussion determined that a single Order was not to be the subject of a hearing. This position was steadfastly held to until February 28, 1957. He announced this position in several documents, and it was reiterated during the hearing from June 18, 1956 to February 28, 1957. This position, known throughout the industry, would serve to lull people into the belief that no change from that position would be taken. In fact, it would indicate that if the Secretary was to change his position, he should really have given a notice longer than the 15 days period in order to give people an opportunity to readjust their thinking and to reexamine the factual situation in order to meet the proposition of a single order. Certainly this situation offers no extenuating circumstances for giving a shorter notice than is explicitly required by the rules and regulations.

The Hearing Examiner in the same paragraph speaks of the subject matters before and after March 5 being pretty much the same. This is really not the situation, as the position and reaction of interested parties to provisions of an order are quite different where, on the one hand Northern New Jersey, by virtue of a single order, might become part of the marketing area of Order No. 27, and on the other hand, where Northern New Jersey might be regulated by a separate order. The amount of milk coming into the marketing area, as compared to the fluid use, is

different where Northern New Jersey is regulated by a single order than where it is regulated by a separate order. The financial returns to the producers would be different, and the obligation of the handlers would be different. The record establishes that the utilization for fluid use is higher in Northern New Jersey and, therefore, if the same class prices were established, the blend price to the producers would be higher. The proponents for a single order use this thesis in support of their contention, concluding that the inclusion of Northern New Jersey would increase the blend price for all of the producers shipping into the marketing area of Order No. 27. Hence, it follows that the same provisions under these alternative situations present quite different issues.

The Hearing Examiner on page 16, the second full paragraph, refers to the evidence taken after March 5, 1957, when a single order was at issue, and holds that the record justifies and supports the general type of regulation promulgated. It is respectfully submitted that the Hearing Examiner cannot find that evidence taken after March 5, 1957 supports the extension of Order No. 27 to Northern New Jersey or in support of any of its provisions, unless the Secretary in his decision points out that he relied on that testimony. The Hearing Examiner then can examine the testimony to determine whether or not it was of such a substantial character as to warrant the Secretary's reliance upon it. The Hearing Examiner is powerless to determine from the decision of the Secretary upon what he relied. The decision demonstrates that the Secretary relied upon the entire record from June, 1956 to March, 1957, for every provision of the Order. He so stated in his February 28, 1957 Call.

The Examiner, in making this holding, is making a determination that the Secretary could and did rely only on the testimony since March 5, 1957. Such a conclusion is not sound. Where an official charged with the duty of promulgating an order relies on an entire record, where part of that record cannot validly be relied upon, the reviewing

authority cannot sustain an order on the grounds that the valid part of the record would have sustained the order. If the reviewing authority so holds, he is then promulgating the order from the valid part of the testimony, without being able to determine whether that part of the testimony would have resulted in the Secretary's promulgating the order. The reviewing authority is not charged with the duty of promulgating orders, and cannot speculate as to what the Secretary would have done had he had only part of the record before him, nor can he determine from the decision, nor can he speculate on the part of the record relied upon by the Secretary.

The same exceptions and observations are made regarding the last two paragraphs on page 16.

On the top of page 16, the Hearing Examiner found that the change of issues upon 5 days notice, instead of 15 days notice, would not and did not deprive interested persons of opportunity to prepare their case. The Petitioners except to this. Witnesses called prior to March 5, 1957, who testified concerning many issues, including compensatory payments, when the call was restrictive were not required to return for further cross examination even though Petitioners' Counsel repeatedly asked that they be recalled, or that their entire testimony be stricken so far as it would relate to a comprehensive order. Both requests were repeatedly denied. An example will serve as an illustration as to why the Examiner's position in this regard is not sound. The witness, Dr. Pierce, who carried the principal burden concerning compensatory payments, testified prior to March 5 and advanced a compensatory payment plan far different from the one subsequently adopted by the Secretary when the issue was expanded to include a single order. No opportunity was granted Petitioners to explore with Dr. Pierce what his plan would be in the event of a comprehensive order. This serves as just one illustration. There are many such illustrations throughout the record.

## Conclusion

Petitioners respectfully submit that the lack of legal notice rendered the hearing, beginning with March 5, 1957, completely invalid insofar as a single order was concerned.

It is further submitted that the entire order, as it affects Northern New Jersey, is invalid for the reason that there is no way to determine upon what part of the record the Secretary depended.

The final conclusion of the Hearing Examiner, holding the compensatory payment provision invalid, is sound and correct.

Respectfully submitted,

Daniels and Swope,
By Willis F. Daniels,
*Attorneys for Petitioners.*

Dated: August 29, 1958.

UNITED STATES DEPARTMENT OF AGRICULTURE, BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-123

In re LEHIGH VALLEY COOPERATIVE FARMERS, PETITIONER

DECISION AND ORDER

*Preliminary Statement*

This is a proceeding under Section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*), involving the validity of amendments to Order No. 27, as amended (7 CFR 927.1 *et seq.*), effective August 1, 1957, issued under the act and regulating the handling of milk in the New York-New Jersey milk marketing area. Petitioner is a handler subject to the order and operates a plant at Allentown, Pennsylvania. Petitioner is also, commencing July 1, 1957, a handler under Order No. 61, as amended, issued under the act and regulating the handling of milk in the Philadelphia, Pennsylvania, milk marketing area.

Petitioner complains of alleged procedural irregularities in the promulgation of the disputed amendments and also contends that the inclusion by section 927.3 of the order of Northern New Jersey in the marketing area regulated by Order No. 27, as amended, and the requirement in section 927.83 of the order that petitioner make payments into the producer-settlement fund under the order on milk it distributes in the marketing area thereunder are invalid. Petitioner alleges, in part, that these provisions of the amended order are not supported by substantial evidence in the promulgation record upon which they were based and that section 927.83 is violative of section 8c(5)(A) of the act (7 U.S.C. 608c(5)(A)). An answer to the petition was filed August 23, 1957, by the Deputy Administrator,

Agricultural Marketing Service, United States Department of Agriculture. The answer upheld the validity of the order as amended.

A hearing was held in New York, New York, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, October 24, 1957. Petitioner was represented by Willis F. Daniels and Harold W. Swope, Attorneys at law, Harrisburg, Pennsylvania, and respondent was represented by John M. Durbin, Office of the General Counsel, United States Department of Agriculture. The Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., Mutual Federation of Independent Cooperatives, Inc., and Dairymen's League Co-operative Association, Inc., intervened for the limited purpose of filing briefs and participating in oral argument. After the hearing the parties and the intervenors filed briefs. On August 6, 1958, the hearing examiner issued a report adopting for this proceeding his recommendations in a companion proceeding, AMA Docket No. 27-121, *In re Sunerest Farms, Inc.*, to the effect that while other grievances of petitioner lack merit, the compensatory payment provisions of section 927.83 of Order No. 27 are invalid *as applied to Northern New Jersey* because the rate of payment is not supported by the evidence in the record upon which the order was amended to include handling in Northern New Jersey. Petitioner, respondent and the intervenors filed exceptions to the hearing examiner's report and oral argument by the parties and the intervenors was held before the Judicial Officer September 30, 1958.

*Findings of Fact*

1. Petitioner, Lehigh Valley Cooperative Farmers, is a corporation organized and existing under the cooperative laws of the State of Pennsylvania with its address and principal place of business at Allentown, Pennsylvania. It is a handler as defined in Order No. 27, as amended, regulating the handling of milk in the New York-New

Jersey milk marketing area and petitioner operates a milk processing or bottling plant at Allentown, Pennsylvania. Petitioner is also a handler regulated under Order No. 61, as amended, regulating the handling of milk in the Philadelphia, Pennsylvania, marketing area and since July 1, 1957, has been subject to the pricing and payment provisions of such order.

2. Pursuant to notices published in the Federal Register (20 F.R. 4307, 6138, 6500, 6609 and 8050), informal meetings were held to consider new territory in the State of New Jersey to be subject to regulation under the act and the method of regulating such area, i.e., by means of a new, separate order or a comprehensive order including the area then regulated under Order No. 27, as amended. These meetings lasted 17 days and over 3,000 pages of testimony and 80 exhibits were introduced.

3. A Notice of Opportunity to Submit Proposals for the regulation of milk handling in a defined territory, consisting of Northern New Jersey, Upstate New York and the area then regulated by Order No. 27, as amended, by a single comprehensive order or separate orders under the act was issued December 27, 1955 (20 F.R. 10167), by the Deputy Administrator, Agricultural Marketing Service. Such notice contains a statement of the Secretary which reads, in part, as follows:

> "The question considered at the last public meeting (concluded on November 23) was whether, for purposes of a subsequent notice or notices of hearing, the handling of milk in the additional territory should be regulated (a) in combination with the present New York milk marketing area under a single order, or (b) by means of one or more separate new orders. The information presented at these meetings has been reviewed and analyzed.
>
> "I have given very careful consideration to this complicated problem and have concluded that recognition must be given to the following principles in establish-

ing any new or revised regulation for the territory under consideration:

"1. The proximity of Northern New Jersey to metropolitan New York and the fact that there is to a considerable degree a common source of supply, make the marketing and pricing of all milk in this region closely interdependent.

"2. The apparent desire and determination of certain groups of producers and handlers for one or more separate marketing orders, and the apparent desire and determination of other groups of producers and handlers for a single marketing order for the entire marketing area constitute differences only as to means of accomplishing an objective rather than disagreement regarding the basic objective of providing orderly marketing in the entire area.

"3. The legitimate interests and obligations of various producer groups must be recognized and provided for regardless of whether regulation is by one order or more than one order.

"4. Among the interests of New Jersey producers is the recognition of any natural economic advantages accruing from nearness to market and any better adjustments they may have made in fitting their pattern of production to market needs. Associated with these interests is the need to assume a responsibility for carrying the surplus connected with the fluid milk supply for Northern New Jersey.

"5. Among the interests of producers now under the New York order is the recognition that they should not be required to carry the surplus for Northern New Jersey without the benefits that accrue from sales of fluid milk there, and that they should not be subjected to chaotic marketing conditions which might result from ill-conceived Federal regulation. On the other hand, they have the obligation of supporting the type of additional Federal regulation which would

protect the legitimate interests of the additional producers to whom such regulation would apply.

"6. Either a comprehensive order or a separate order for New Jersey must be devised so as: (a) To insure that producers under either type of order carry the surplus associated with their fluid outlets, and (b) to achieve the required stability throughout the entire metropolitan milkshed without forcing disorderly and abnormal maneuvering of supplies and outlets.

"After establishing the above set of principles, I have decided to invite interested parties to submit proposals containing terms and provisions which are in accordance with such principles and which are in one of the following forms:

"(1) A single order covering all of the milk supply for the present Order No. 27 marketing area plus all or a portion of the additional territory under consideration, with adequate provisions (a) for protecting the interests of New Jersey producers because of their location and the degree of adjustments of their production to market outlets, and (b) for solving marketing problems not now adequately handled under Order No. 27.

"(2) A separate order for New Jersey, with or without all or a portion of the six nearby New York counties, and which will include terms and provisions under which such order will (a) carry the surplus associated with its fluid outlets, (b) provide for such minimum uniform prices to producers that there will be no incentive for uneconomic and disorderly shifting of producers or plants from one market outlet to another, and (c) provide for close alignment of minimum class prices. Any such proposed order should be accompanied by proposed amendments to Order No. 27 for purposes of making the two orders complementary."

A second notice giving interested parties an opportunity to submit proposals for regulation of milk handling in such area by a separate marketing order only for Northern New Jersey together with proposals to amend Order No. 27, as amended, was issued February 29, 1956 (21 F.R. 1418). Such notice contains a statement of the Secretary which reads, in part, as follows:

> "Although a controversy has developed regarding the method of regulation in the New York-New Jersey area, I do not believe this is the essential issue. The primary issue instead is the institution of effective price regulation in Northern New Jersey. My decision is directed toward that basic issue. Either under a so-called 'comprehensive order' or under separate orders for New Jersey and New York, minimum price regulation on all milk can be made effective, and the sharing of surplus properly associated with the marketing of fluid milk can be achieved. By either means, returns to producers shipping both to the New York and New Jersey portions of the area can be improved. Moreover, the other principles which I enunciated on December 15 can be effectuated by either means.
>
> "I have decided that adequate regulation of the whole area can be gained more certainly and more expeditiously by hold a hearing for consideration of a separate order for the New Jersey area. The Case Committee made a similar recommendation in its report. The major problem, that is, absence of regulation in New Jersey, can be attacked directly and the special conditions which characterize the marketing of milk in the New Jersey portion of the area can be given separate attention. At the same time, producers whose milk is marketed in New York will be on notice that improvement of their returns is being actively considered and that such improvement will probably be effectuated earlier than by consideration of a comprehensive order. Also, the changes

which might be needed to bring Order No. 27 up-to-date and provide for necessary coordination with a New Jersey order can be achieved by this procedure.

"The problem on which the Department made its decision today is one of the most difficult we have faced with respect to milk marketing since I have been Secretary of Agriculture. Proponents of both the so-called 'comprehensive order' and separate orders present some very persuasive facts and arguments in support of their different points of view. It is not the first time the question has arisen. I understand that there has been controversy over a period of at least 18 years. It was first considered by the Department at the time of the promulgation hearing of the Order No. 27 in 1938. Consideration also was given to the problem in public hearings held in 1942 and 1952. No action was taken on any of these occasions. Such need not be the case this time if the interested parties now turn their attention to developing evidence and testimony for presentation at a public hearing.

"In my statement of December 15, 1955, certain principles were set forth to which proposed terms and provisions of a separate order for New Jersey (with coordinating amendments to Order No. 27) should conform. It was indicated that such a separate order should include terms and provisions under which such an order will (a) carry the surplus associated with its fluid outlets, (b) provide for such minimum uniform prices to producers that there will be no incentive for uneconomic and disorderly shifting of producers or plants from one market to another, and (c) provide close alignment of minimum class prices. The proposals so far submitted do not conform in all respects to the principles set forth, or contain all the provisions which should be the subject of a hearing, and the decision to hold a hearing on separate orders should not, of course, be construed as approval

by the Department of such proposals. It is believed, however, that the proposals submitted on a separate order and complementary changes in Order No. 27 provide a suitable starting point from which adequate provisions can be formulated for consideration at a public hearing."

4. A notice was issued May 18, 1956 (21 F.R. 3537) of a hearing to begin June 18, 1956, in Newark, New Jersey, with respect to regulation of milk handling in the territory described in Finding of Fact 3. The notice contained detailed proposals for an order regulating Northern New Jersey and for the amendment of Order No. 27 to coordinate it with any new order that might be issued regulating the Northern New Jersey area. A supplemental notice of hearing containing additional proposals was issued May 29, 1956 (21 F.R. 3799).

5. A supplemental notice concerning procedure was issued August 29, 1956 (21 F.R. 6680), by the Acting Secretary providing for the separation of proposals to amend and expand Order No. 27 to include additional territory in the State of New York from the other issues in the rule-making proceeding, the completion of hearing on such issue and the certification of the record thereof.

6. On February 21, 1957, the hearing examiner issued a notice (22 F.R. 1128) that the hearing would reconvene March 5, 1957, in New York City. The Secretary issued a press release dated February 21, 1957, announcing that the hearing would be open for the submission of evidence on a single milk marketing order for the territory involved. A supplemental notice was issued February 26, 1957, and published in the Federal Register February 28, 1957 (22 F.R. 1219), of the matters to be considered at the reconvened hearing of March 5, 1957.

7. Upon the basis of the evidence introduced at the hearing, the Deputy Administrator, Agricultural Marketing Service, filed a recommended decision May 9, 1957 (22 F.R.

3318), and time was given to file exceptions. A decision by the Acting Secretary was filed June 10, 1957 (22 F.R. 4194) and reads, in part, as follows:

> "Exceptions were taken to failure to eliminate provision for compensatory payments pursuant to the proviso of § 927.83 (b) (1). In support of the exception it was contended that the circumstances under which provision was made in 1953 for such payments (and the companion provision of Order No. 61) no longer exist primarily because of the marketing area expansion herein provided. It is found, on the contrary, that expansion of the marketing area or other changed conditions does not eliminate the need or basis for such payments. Discontinuance of provision for such payments would invite the resumption of practices and consequences prevailing prior to adoption of such provision. The factual situation most material in this connection is that the provision continues for marketwide pooling under Order No. 27 and for individual handler pooling under Order No. 61. Accordingly, such exceptions are denied."

Some of the evidence in support of these findings and conclusions may be found at pages 12922-31, 14042-43, 14979, 14984-86, 14988, 14991, 15020-29, 15344-49 of the promulgation hearing record.

8. The order amending Order No. 27, as amended, was issued by the Assistant Secretary June 27, 1957 (22 F.R. 4643) effective August 1, 1957. The amending order reads, in pertinent part, as follows:

> "§ 927.3 *Marketing area.* 'New York-New Jersey milk marketing area' (hereinafter called the 'marketing area') means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section * * *.

"(b) The following counties and parts of counties * * * in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren."

"§ 927.83 *Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

"(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

"(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in § 927.65 (h) (2) or (3) was received from the handler's own farm.

"(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

"(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

"(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

"(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this part: *Provided,* That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to § 927.44 adjusted for the location of the plant.

"(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided,* That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be com-

puted on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 as similarly adjusted for location. * * *

"(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph: * * *

"(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80."

9. Order No. 61 reads, in part, as follows:[1]

"§ 961.53 *Class I milk disposed of in the New York-New Jersey marketing area.* The price to be paid by handlers for Class I milk disposed of in the New York-New Jersey marketing area (Part 927 of this chapter) shall be the Class I-A price computed pursuant to such part less such payment as is required on such milk pursuant to such part."

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[1] Prior to February 1, 1958, section 961.53 was numbered as section 961.43 and referred to the New York metropolitan milk marketing area. The change effective February 1, 1958, was purely administrative and reflected administrative practice and intent prior thereto. (See 22 F.R. 9600.)

10. Petitioner distributes Class I milk monthly in a part of New Jersey that is included in the New York-New Jersey marketing area, and the market administrator for Order No. 27 billed petitioner for the difference between the Order No. 27 Class I-A and Class III prices pursuant to section 927.83(b)(1) of Order No. 27 as amended since petitioner commencing July 1, 1957, became subject to the pricing and payment provisions of Order No. 61. The amounts due monthly are being paid into the Registry of the United States District Court for the Eastern District of Pennsylvania pending the outcome of this litigation. (See *United States* v. *Lehigh Valley Cooperative Farmers*, 161 F. Supp. 885 (E.D. Pa. 1957).)

11. Section 8c(5)(A) and (F) of the act (7 U.S.C. 608c (5)(A) and (F)) reads as follows:

"(5) Milk and its products; terms and conditions of orders.

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

* * * *

"(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative

marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk."

12. Section 900.4 (7 CFR 900.4) of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders reads as follows:

"§ 900.4 *Institution of proceeding*—(a) *Filing and contents of the notice of hearing.* The proceeding shall be instituted by filing the notice of hearing with the hearing clerk. The notice of hearing shall contain a reference to the authority under which the marketing agreement or marketing order is proposed; shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed marketing agreement or marketing order or a description of the subjects and issues involved and shall state the industry, area, and class of persons to be regulated, the time and place of such hearing, and the place where copies of such proposed marketing agreement or marketing order may be obtained or examined. The time of the hearing shall not be less than 15 days after the date of publication of the notice in the FEDERAL REGISTER, as provided in this subpart, unless the Deputy Administrator shall determine that an emergency exists which requires a shorter period of notice, in which case the period of notice shall be that which the Deputy Administrator may determine to be reasonable in the circumstances: *Provided*, That, in the case of hearings on amendments to marketing

agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of publication of the notice in the FEDERAL REGISTER."

*Conclusions*

I

We are presented at the outset with alleged procedural irregularities in the promulgation of the amendment to Order No. 27, as amended, effective August 1, 1957, which are basic to petitioner's case. First, petitioner contends that adequate notice of hearing was not afforded it.

As seen from the Findings of Fact, a notice of hearing was issued May 18, 1956 (21 F.R. 3537), after informal public meetings lasting 17 days and after two notices of an opportunity to submit proposals for the regulation of milk marketing in a defined area, including the 13 Northern New Jersey counties and the area then regulated by Order No. 27, as amended. The notice was issued "for the purpose of receiving evidence with respect to the economic and marketing conditions relating to the handling of milk in a proposed Northern New Jersey milk marketing area, and with respect to issuance of a marketing agreement and order regulating the handling of milk in the said marketing area, and also for the purpose of receiving evidence with respect to the proposed amendments hereinafter set forth, or appropriate modifications thereof, to the tentative marketing agreement and to the order, as amended, regulating the handling of milk in the New York metropolitan marketing area (7 CFR 927 *et seq.*)."

A supplemental notice of hearing was issued May 29, 1956 (21 F.R. 3799), and after the hearing had been in progress, a supplemental notice concerning procedure was issued August 29, 1956 (21 F.R. 6680). (See Finding of Fact 5.) On February 21, 1957, the hearing examiner issued a notice (22 F.R. 1128) that the hearing would reconvene March 5, 1957, in New York City. A supplemental

notice of hearing was issued February 26, 1957, and published in the Federal Register February 28, 1957 (22 F.R. 1219) of matters to be considered at the reconvened hearing of March 5, 1957. It is this notice of hearing which petitioner claims is defective.

The notice stated that "the notices heretofore issued are hereby amended to include consideration of whether, on the basis of the entire record in this proceeding, a single marketing agreement and order regulating the handling of milk for a marketing area consisting of all the territory in the States of New York and New Jersey for which regulation has been proposed should be issued and would better effectuate the purposes of the act than two or more separate marketing agreements and orders for such territory." It was further stated in such notice that evidence will be received "(1) with respect to specific terms and provisions of a single marketing agreement and order and (2) as to whether such a single marketing agreement and order, if issued, should be issued in the form of a new marketing agreement and order or by amending Order No. 27."

The disputed notice was issued seven days before the date of the reconvened hearing and published in the Federal Register five days prior to such date. Petitioner alleges that the notice was in violation of the requirements of section 900.4 of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders (7 CFR 900.4). This section of the rules of practice describes the procedure for the *institution* of a rule-making proceeding under the act and also states that the time of the hearing held pursuant to the notice of hearing instituting the proceeding "shall not be less than 15 days after the date of publication of the notice in the FEDERAL REGISTER." A proviso contained in the section permits a lesser time in the case of hearings on amendments to marketing agreements or marketing orders. In such event, the hearing "shall not be less than 3 days after the date of publication of the notice in the FEDERAL REGISTER."

It is our opinion that section 900.4 of the rules of practice is inapplicable to the February 26, 1957, supplemental notice of hearing.[2] Section 900.4 deals with the *institution* of rule-making proceedings. In other words, this section is concerned with the notice necessary to *institute* a proceeding to formulate either a new marketing order or an amendment to an existing order. It covers the first notice of hearing of either such proceeding. The disputed notice was a supplemental notice which came after the hearing had been going on for 84 or 85 days and after some 12,000 pages of testimony had been adduced. It constituted an amended notice of hearing and by its terms gave notice that the notices theretofore issued in this quasi-legislative proceeding were amended thereby. The disputed notice did not *institute* the rule-making proceeding and section 900.4 does not cover the situation involved herein. The rules of practice are silent with respect to the time required between a notice and the hearing resulting therefrom where, as here, an amended notice is issued during the course of a hearing. That a period of time between notice and resumption of a hearing different from that provided in section 900.4 could be desirable is seen from the circumstances preceding the disputed notice, as set forth below.

While we hold that the disputed notice is not in conflict with the rules of practice, we should also consider whether the interested parties had sufficient time under the circumstances to prepare for the March 5, 1957, reconvened hearing. Of course notice of a hearing must also comply with the act (see sections 8(c)(3) and (4)) and section 4 of the Administrative Procedure Act (5 U.S.C. 1003). The notice of February 26, 1957, clearly met such standards.

At the beginning of the extended procedure which resulted in the disputed amendments to Order No. 27, as

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[2] A contrary conclusion would not aid petitioner as the notice issued February 26, 1957, might well be considered notice of a *proposed amendment* to Order No. 27, as amended, requiring only 3 days' notice.

amended, petitioner was apprised, and had to prepare for the possibility, of a single order regulating the handling of milk in the New York-New Jersey marketing area. This matter, pursuant to notices issued in the Federal Register, was discussed and considered at the informal meetings held prior to the December 27, 1955, notice and it appears that petitioner was represented at these informal sessions. The informal meetings lasted 17 days and over 3,000 pages of testimony and 80 exhibits were introduced. In the notice of opportunity to submit proposals issued December 27, 1955, by the Deputy Administrator, interested parties were asked to submit proposals for regulation of the described area by one comprehensive order or by separate orders. Next, the first notice of hearing issued May 18, 1956, contained exhaustive and detailed proposals for a proposed order regulating Northern New Jersey and for the amendment of Order No. 27 to coordinate and interrelate such amended order with any new order that might be issued regulating the Northern New Jersey area. In addition, at the hearing sessions prior to March 5, 1957, testimony as to the incorporation of the entire area to be regulated under a single order was presented in evidence as rebuttal to testimony that a separate order for Northern New Jersey was appropriate.

Although the contested notice was issued February 26, 1957, and was published in the Federal Register two days later, the Secretary issued a press release dated *February 21, 1957*, announcing that "the public hearing on proposed New York-New Jersey milk regulation would be opened for the submission of evidence on a new approach to terms and provisions of a single milk marketing order for regulation of the handling of milk for an area including Northern New Jersey, the present New York marketing area, and urban territory in upstate New York."

The notice issued February 26, 1957, did not raise matters which a reasonable man in petitioner's position would not have considered prior thereto. The disputed notice did not expand the area or scope of regulation beyond that

set forth in the earlier notices but merely informed interested parties that milk handling in the defined area might be regulated in a somewhat different *administrative form.* By such notice the milk industry in the New York-New Jersey area was informed that there would be considered at the reconvened hearing the question of whether a single order rather than two separate orders should be issued. This was an issue present in the proceeding prior to this time, and, indeed, had been specifically considered at an earlier date. The economic and marketing factors necessary for consideration under the prior notices were basic elements of the hearing held pursuant to the contested notice. Petitioner was not confronted with entirely new matters. Petitioner certainly cannot plead surprise or inadequate notice and time for preparation with respect to the regulation of milk handling in Northern New Jersey. Nor should the statement in the contested notice that evidence would be received on specific terms and conditions of a single order have required extensive preparation. Petitioner and others had been concerned with specific provisions to be placed in a separate order for Northern New Jersey and appropriate amendments to Order No. 27 in view of a possible order for Northern New Jersey, and the matters and provisions previously considered were basic to any provisions to be included in a single comprehensive order. In addition, the matters set forth in detail in the disputed notice also had been considered at the prior hearing sessions.

In view of the entire history of the rule-making proceeding prior to February 26, 1957, and the contents of the notice amendment of such date, we cannot say that petitioner was not afforded a reasonable time by such notice to prepare for the hearing to begin March 5, 1957. That such is the case is also indicated by the fact that neither petitioner nor other interested parties requested a continuance on the ground of inadequate time to prepare for the March 5, 1957, hearing session. Moreover, the hearing continued through March 29, 1957, and ample time was

thereby afforded for further preparation during the pendency of the hearing.

It must be concluded also on the basis of the entire record of the hearing lasting 102 days where approximately 16,000 pages of testimony was adduced and the informal conferences that petitioner was afforded a reasonable opportunity to prepare and be heard. Microscopic inspection of isolated parts of the rule-making process is not a proper examination to determine whether the standards of fair play have been met as such an inquiry is not designed to produce a clear picture of the entire proceeding. Cf. *Owensboro on the Air, Inc.* v. *United States*, 8 Pike & Fischer Admin. Law (2d) 701 (D.C. Cir. 1958). It is concluded further that the amendment effective August 1, 1957, was clearly within the scope of the disputed notice together with the other notices issued in the rule-making proceeding which preceded its issuance. The notices were patently adequate to support the order issued. Cf. *United States* v. *Wrightwood Dairy Co.*, 127 F. 2d 907 (7th Cir. 1942); *Pearson* v. *Walling*, 138 F. 2d 655 (8th Cir. 1943); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); *In re Terrace Park Dairy*, 12 A.D. 1383 (1953). *In re Belle-Vernon Milk Company*, 13 A.D. 447 (1954).

It seems to us that regardless of our foregoing discussion of the adequacy of notice generally for the regulation of Northern New Jersey handling by amendments to Order No. 27, petitioner is perhaps in a position to raise and have adjudicated in this connection only the issue as to adequacy of notice *with respect to the obligation imposed upon it by the amended order*, namely, payment for fluid milk disposed of in the marketing area pursuant to section 927.83(b)(1) of Order No. 27 and section 961.53 of Order No. 61. The provisions attacked were included in the proposals for a separate order for Northern New Jersey upon which hearing sessions were held in 1956 at which petitioner was represented by counsel (see 21 F.R. 3557). Certainly petitioner had ample notice from the beginning of

the entire proceeding that a regulation such as that now protested was proposed and was the subject of hearing.

II

Petitioner also complains of the fact that in issuing the protested amendments the Secretary relied upon the entire record of the hearings commencing in June 1956. Petitioner claims that the testimony given prior to March 1957 when the proposals were for a separate order for Northern New Jersey cannot be legally utilized in support of the amendments issued providing for regulation of Northern New Jersey milk handling under Order No. 27, as amended.

Petitioner cannot show that the Secretary utilized any evidence adduced before the reconvened hearing in support of the *administrative form* of regulation adopted, that is, in support of the regulation of Northern New Jersey handling by means of amendments to Order No. 27. And as to substance, that is, the need for regulation for Northern New Jersey and the terms of such regulation, we conclude also that petitioner has not demonstrated that consideration of evidence on these matters received at the hearing sessions prior to the reconvened hearing deprived petitioner of due process of law. Indeed it may be that the Secretary was required to consider the entire record since the hearing sessions prior to March 1957 involved the question as to whether there should be *any* regulation of milk handling in Northern New Jersey.

Petitioner advances the argument that its cross-examination of witnesses supporting regulation under the act of Northern New Jersey handling would have been different if the witnesses had been testifying pursuant to a proposal for regulation by means of amendments to Order No. 27 instead of by a separate order. But we fail to see how petitioner whose standing to sue in this proceeding is as a *handler* was legally damaged since the impact upon petitioner is the same under the administrative form selected

as it would have been under a separate order for Northern New Jersey.

In any event the protested inclusion of Northern New Jersey in the regulated marketing area is supported by substantial evidence received at the *reconvened hearing*. See, *e.g.*, pages 12772, 12792, 12811-12, 12828, 12864, 12909-20, 12924, 12933, 13397-99, 13417, 13706-12, 13952, 14020-55, 14155-56, 14327-40, 14698-734, 14778, 14806, 15010-16, 15060-61 of the promulgation hearing record. The decision of the Secretary referred to in Finding of Fact 7 contains an exhaustive discussion of the evidence and the reasons for the issuance of the protested regulation. We conclude that the Secretary's finding that the challenged amendments to Order No. 27 would tend to effectuate the purposes of the act is amply substantiated by the evidence and upon the evidence is a valid and reasonable exercise of administrative discretion. The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters for administrative competence. *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U.S. 112 (1946); *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 613-614 (1950).

III

While petitioner throughout this proceeding attacks section 927.83 of Order No. 27, as amended, in terms of "compensatory payments" which petitioner calls a "penalty" and a violation of section 8c(5)(A) of the act (7 U.S.C. 608c(5)(A)) the problem presented in this proceeding, unlike that in the companion proceeding, *In re Sunerest Farms, Inc.*, AMA Docket No. 27-121, is one pertaining to the interrelationship and coordination of Federal milk orders issued under the act.

Commencing July 1, 1957, prior to the effective date of the protested regulation but subsequent to the Secretary's decision to issue the amended Order No. 27 involved, the

petitioner became a handler and the operator of a producer milk plant under Order No. 61 regulating the handling of milk in the Philadelphia marketing area.

Section 961.53 of the Philadelphia order provides, in effect, that for Class I (fluid) milk disposed of in the marketing area regulated under Order No. 27, as amended, the price shall be the Class I-A (fluid milk) price under Order No. 27, as amended, less such payment as is required on the milk by the latter order. (See Finding of Fact 9.) Order No. 27, as amended, in turn, provides that if another Federal milk order permits the deduction of the payment required under Order No. 27, as amended, from the amount otherwise due for the milk involved pursuant to the other order, as is the case in Order No. 61, as amended,[3] the

[3] The fact that petitioner, as a cooperative, may not pay to its producer-members its uniform or blend price under Order No. 61 does not alter our conclusion herein concerning the interplay of the two Federal orders with respect to it. The language of the Philadelphia order includes petitioner's milk with the milk to be classified and paid for thereunder and the Order No. 27 Class I-A price is due from petitioner under the wording of Order No. 61 for the milk involved herein. The Philadelphia order, *by its terms*, makes no exemption or distinction between proprietary and cooperative handlers in these respects and no intention to do so is evidenced in such order. The market administrator for Order No. 61 classified and priced petitioner's milk under such order. Moreover, the problems arising due to the proximity of the two orders with different types of pooling schemes, as set forth herein, are present whether a cooperative or a proprietary handler is involved. It is only by reason of section 8c(5)(F) of the act (7 U.S.C. 608c(5)(F)) that petitioner may pay other than its uniform or blend price under the order and that may be done *only* if it reblends its milk and provided it does not sell its milk to handlers at prices lower than order prices. The order itself contains no such provision and such ability in the petitioner to reblend does not alter the express requirements of the two orders in the context of the coordination of two Federal orders. For purposes of order *construction*, as distinguished from statutory authority to reblend, the New York-New Jersey Class I-A price is due from petitioner for the milk involved herein pursuant to Order No. 61, as amended. To conclude otherwise is to discriminate in favor of cooperative handlers

amount of payment for such milk shall be the difference between its classified value at the Class I-A price and its value at the Class III price with some adjustments not here in issue. In other words, by reason of the operation of the two Federal orders, a handler regulated under the Philadelphia order must pay *in toto* as the minimum price under such order the Class I-A price under Order No. 27, as amended, for fluid milk marketed in the area regulated by the New York-New Jersey order. This payment is then divided with the difference between the Order No. 27 Class I-A and Class III prices paid into the New York-New Jersey producer-settlement fund and such order's Class III price as the minimum price for such milk in the individual handler pool of the Philadelphia handler under the Philadelphia order.

Payment for milk in the manner prescribed under sections 961.53 of the Philadelphia order and 927.83 of the New York-New Jersey order neither increases nor decreases the minimum price established by Order No. 61 for milk disposed of in the marketing area regulated by Order No. 27. Full credit is given by the Philadelphia order against the total minimum obligation otherwise imposed by such order for the payment required to the Order No. 27 pool. The two orders provide, in the case of a handler who disposes of Class I (fluid) milk in both marketing areas, that an amount related directly and exclusively to the volume disposed of in the New York-New Jersey marketing area is to be included in that pool and the entire remaining amount is to be distributed through the individual handler pool established by Order No. 61, as amended. *The total minimum order price to the Order 61 handler for milk distributed in the New York-New Jersey marketing area is the same as that paid by other handlers marketing milk in such area and regulated by Order No. 27, as amended,* and is *uniform*

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in the absence of any stated intention to do so. Even if our conclusion were otherwise, the payments assessed against petitioner may still be due under section 927.83 of the New York-New Jersey order. (See In re Sunerest Farms, Inc., AMA Docket No. 27-121.)

as to both handlers so distributing milk in such area. Consequently, the uniform price requirement of section 8c(5)(A) of the act and the rationale of the decision in *Kass* v. *Brannan*, 196 F.2d 791 (2d Cir. 1952), *cert. denied*, 344 U.S. 891 (1952), cited by petitioner are not violated.

Petitioner's complaint in this proceeding is, rather, that the fluid value of the milk in question, that is, the difference between the Class I-A and Class III prices, is included in the New York-New Jersey producer-settlement fund and the manufacturing or surplus value thereof, i.e., Class III, is distributed through its individual handler pool under the Philadelphia order.[4] Stated another way, petitioner's grievance is that its producers do not receive the benefit of the fluid utilization of the milk disposed of by it in the New York-New Jersey marketing area.

Order No. 27 provides for a marketwide pool and marketwide equalization of producer returns. The order contains a scheme whereby each handler pays for milk subject to regulation under the order at class values or prices, differing according to the use he makes of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by *all* handlers under the amended order. Each handler pays his producers at the uniform price and then, through adjustments with the producer-settlement fund kept by the market administrator, brings the total he has paid to producers up to (by paying money into the producer-settlement fund) or down to (by receiving money from such fund) the total he is required to pay at class prices. In effect, a handler receives from the producer-settlement fund the amount by which the value of his milk at class prices is less than the value at

[4] However, no provision of Order No. 61, as amended, is here challenged as being unlawful. Although petitioner makes reference to price regulations by the Pennsylvania Milk Control Board petitioner is now regulated by Order No. 61, a Federal order, and even prior to becoming so petitioner was not required to pay State fixed prices to its producers although the State Milk Control Board audited its records to ascertain its returns to producers.

the blend price and pays into the producer-settlement fund the amount by which the value of his milk at the class price exceeds the value at the blend price. On the other hand, Order No. 61 provides for an individual handler pool whereby each handler pays for milk subject to regulation under that order at class values or prices, differing according to the use he makes of the milk, while producers delivering to such handler receive a uniform or blend price based upon the total value of all milk used by *such* handler.

It was shown in the hearing record upon which section 927.83 was issued that Order No. 61 handlers distribute in the New York-New Jersey marketing area and that the production areas for the Philadelphia and New York-Northern New Jersey markets overlap. There was also evidence to the effect that while the Philadelphia Class I price is generally lower than the Class I-A price under Order No. 27, the individual handler pool price to producers delivering to Philadelphia handlers is generally higher than the uniform price to producers under Order No. 27 because milk purchases by Philadelphia handlers from producers are trimmed somewhat to the handlers' fluid needs, with the Order No. 27 pool carrying the reserve supplies for these handlers for use when needed by them. Obviously then an Order No. 61 handler would have procurement advantages [5] over an Order No. 27 handler with respect to milk sold in the marketing area regulated by Order No. 27 if he had only to pay the Philadelphia Class I price for the milk, and the same would be true if he had only to pay the Order No. 27 Class I-A price *to his own producers* rather than pool this value of the milk in the market-wide pool covering the regulated marketing area as must be done by the Order No. 27 handler.

There appears to have been no testimony at the promulgation hearing in opposition to the provisions of section 927.83(b)(1) although there was evidence in objection to

[5] This would not be the case for fluid milk sold in the Order No. 27 marketing area by a handler under another Federal order that provides for a marketwide rather than an individual handler pool.

other provisions of section 927.83 with respect to compensatory payments by nonpool plants that are not regulated under a Federal order. It does not seem to be necessary to have much evidence to conclude that an Order No. 61 handler selling milk in the area regulated by Order No. 27 should pay as the minimum price for such milk the minimum price paid by the Order No. 27 handlers.[6]

Exception, however, was taken by the Interstate Milk Producers Association to the failure of the recommended decision which preceded the issuance of the contested amendment, effective August 1, 1957, to eliminate from the proposed amended order the provision here in issue. The decision of the Acting Secretary with respect to the disputed amendment issued June 10, 1957 (22 F.R. 4194, 4208), denied such exception concluding that discontinuance of the provision "would invite the resumption of practices and consequences prevailing prior to adoption of such provision. The factual situation most material in this connection is that the provision continues for marketwide pooling under Order No. 27 and for individual handler pooling under Order No. 61."[7] It was also found in this decision that the existence of a marketwide pool under Order No. 27, as amended, results in the tendency for the reserve supply of other markets, such as the Philadelphia market, to be included in the Order No. 27 pool, the only available marketwide pool (22 F.R. 4206).

The real objection of petitioner is having to pay the difference between the Class I-A price and the Class III price into the producer-settlement fund under Order No.

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[6] Despite our adjudicaton above of the issue as to whether extension of the regulated marketing area to include Northern New Jersey was sustained by the evidence in the promulgation record, it may be that petitioner, not being a regulated pool handler, is entitled on the matter of supporting evidence to raise only the question as to whether the provisions of the order applicable to it, that is, section 927.83(b)(1), are based upon adequate evidence.

[7] See *decision* of the Secretary in December 1953 (not the hearing record leading to decision) when provisions were originally made part of Order No. 27 as amended. 18 F.R. 8444.

27, as amended, instead of to its own producer-members. It is an essential feature of both individual handler and marketwide pools that a particular producer does not necessarily receive the value at the classified price of the classification in which his particular milk was utilized by the handler. Justification for the pooling requirement attached is seen in part in the evidence to the effect that the marketwide pool carries the surplus and the reserves for the entire area, including that in which Order No. 61 handlers operate, that is, that Pennsylvania and Order No. 61 handlers generally trim somewhat their purchases of milk close to their fluid needs and call upon the marketwide pool milk under Order No. 27 for supplemental supplies of fluid milk when they need them. On the other hand, there is the opportunity in the absence of some such provision as section 927.83(b)(1) for an Order No. 61 handler to dispose of his surplus [8] when he has any in the regulated marketing area under Order No. 27. One of the principles involved, then, is that the pool producers who carry the burden of the reserve supply for nonpool plants should have the benefit of the fluid value of sales of Class I milk in the regulated area by plants selling milk of dairy farmers who do not carry their full share of the surplus for the entire area and who displace pooled milk in Class I sales in the marketing area operating under a marketwide pool.[9]

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[8] While it may be argued that petitioner does not dispose of surplus milk in the New York-New Jersey marketing area, petitioner was *not* a handler or a "producer milk plant" regulated under Order No. 61 at the time of the promulgation hearing preceding the contested amendments and its situation as subject to Order No. 61 was not presented to the Secretary in the promulgation of section 927.83 of Order No. 27. The validity of section 927.83 must be determined on the basis of the promulgation hearing record. Acme Fast Freight, Inc. v. United States, 7 Pike & Fischer Admin. Law (2d) 186, 187 (S.D. N.Y. 1957); In re Terrace Park Dairy, 12 A.D. 1383, 1396-1397 (1953), and cases cited therein.

[9] Petitioner's distribution of milk in the Order No. 27 marketing area is about three to four percent of its total disposition of milk.

The methods adopted to solve the problem of the integration of Order No. 27 and Order No. 61 with respect to fluid milk disposed of by Order No. 61 handlers in the marketing area regulated under Order No. 27 are supported by evidence in the promulgation record, are reasonable,[10] are appropriate to a permissible end and reflect the conditions prevailing or reasonably to be anticipated in the New York and Northern New Jersey market.[11]

We think too that the plan complained of is authorized by section 8c(5) of the act which provides for the classification, pricing and pooling of milk. The net effect of sections 961.53 of Order No. 61 and 927.83 of Order No. 27 is to allocate to a Class III use under Order No. 61 fluid milk distributed by an Order No. 61 handler which is produced by a dairy farmer not a producer under Order No. 27. It gives to producers as defined by Order No. 27 the benefit of the higher utilization. Such a scheme is valid under the act. Cf. *Bailey Farm Dairy Co.* v. *Jones*, 61 F. Supp. 209 (E.D. Mo. 1945), *aff'd.* 157 F.2d 87 (8th Cir. 1946), *cert. denied*, 329 U.S. 788 (1946).

At any rate, in addition to the statutory authorizations in section 8c(5), additional or auxiliary provisions may be

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[10] It should not be overlooked that petitioner has had the option of becoming a fully regulated pool plant under Order No. 27 which if exercised would relieve the petitioner of the payments it opposes in this proceeding.

[11] "The background and legislative history of the Agricultural Marketing Agreement Act of 1937, as amended, leave no doubt that Congress gave the Secretary broad discretion in its administration." Queensboro Farm Products, Inc. v. Wickard, 137 F.2d 969, 977 (2d Cir. 1943). "The 'terms' of the Order are largely matters of administrative discretion" and the technical details "are left to the Secretary and his aides." Stark v. Wickard, 321 U.S. 288, 310 (1944). The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy selected and such policy are peculiarly matters for administrative competence. American Power & Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 112 (1946); Secretary of Agriculture v. Central Roig Refining Co., 338 U.S. 604, 613-614 (1950).

included in a milk order under section 8c(7)(D) of the act (7 U.S.C. 608c(7)(D)) if such provisions are:

> "(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) and necessary to effectuate the other provisions of such order."

The incidental and necessary powers thus granted the Secretary under the act are substantial (*Grant* v. *Benson*, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)) and "necessary" as used in this connection in the act does not mean indispensable, essential or vital. *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-132 (1944); *Borden Company* v. *Borella*, 325 U.S. 679, 682-684 (1945); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 664 (1946); *In re Beatrice Foods Co.*, 15 A.D. 767 (1956), *aff'd*, *Beatrice Foods Company* v. *Benson*, N.D. Okla. 1957 (16 A.D. 177). The disputed provision herein clearly falls within the incidental and necessary authority contained in section 8c(7)(D) of the act. It was incidental to the regulatory plan for pricing and pooling producer milk, as defined in the order, and necessary to protect the integrity of that plan in the New York-New Jersey area. (See Finding of Fact 7.)

Finally, petitioner is here in this proceeding as a *handler* and is in the position of being restricted to grievances as a *handler*. The provisions complained of make the total minimum cost of the milk sold in the regulated marketing area Class I-A and we do not believe as far as this proceeding is concerned that the petitioner, any more than a proprietary handler, has standing to complain of the way the Class I-A price is divided among producers, that is, as between petitioner's members and the pool producers under Order No. 27. *United States* v. *Rock Royal Cooperative, Inc.*, *supra*. The fact that petitioner is a cooperative association of producers does not change our view since cooperative associations of producers that are handlers are not given any rights by the act different from those accorded

proprietary handlers except where specified by the act. Cooperative associations of producers are required by the act as handlers to pay into the producer-settlement fund under a marketwide pool the excess in value at the classified prices of the milk handled by them over the value at the uniform price.

IV

We have discussed somewhat at length the major issues raised by petitioner. Any objections, exceptions, arguments, etc., made by petitioner inconsistent with this decision and order are denied or overruled.

*Order*

In view of the foregoing, the relief requested is denied and the petition is dismissed.

Done at Washington, D. C. February 17, 1959.

THOMAS J. FLAVIN,
*Judicial Officer.*

DECISION AND ORDER (RE SUNCREST)

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket No. 27-121

In re SUNCREST FARMS, INC., PETITIONER

DECISION AND ORDER

*Preliminary Statement*

This is a proceeding under Section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*), involving the validity of amendments to Order No. 27, as amended (7 CFR 927.1 *et seq.*), effective August 1, 1957, issued under the act and regulating the handling of milk in the New York-New Jersey milk marketing area. Petitioner is a handler subject to partial regulation under the order and operates a milk plant located in the State of Pennsylvania.

Petitioner complains of alleged procedural irregularities in the promulgation of the disputed amendments and also contends that the inclusion by section 927.3 of the order of Northern New Jersey in the marketing area regulated by Order No. 27 and the requirement in section 927.83 of the order that petitioner make payments into the producer-settlement fund under such order on milk it distributes in the marketing area thereunder are invalid. Petitioner alleges, in part, that these provisions of the amended order are not supported by substantial evidence in the promulgation record upon which they were based and that section 927.83 is violative of section 8c(5)(A) of the act (7 U.S.C. 608c(5)(A)). An answer to the petition was filed August 23, 1957, by the Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture.

A hearing was held October 23, 1957, in New York, New York, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agri-

culture. Petitioner was represented by Willis F. Daniels and Harold W. Swope, Attorneys at Law, Harrisburg, Pennsylvania, and respondent was represented by John M. Durbin, Office of the General Counsel, United States Department of Agriculture, Metropolitan Co-operative Milk Producers Bargaining Agency, Inc., Mutual Federation of Independent Cooperatives, Inc., and Dairymen's League Co-operative Association, Inc., intervened for the limited purpose of filing briefs and participating in oral argument. After the hearing, the parties and the intervenors filed briefs. On August 6, 1958, the hearing examiner issued a report proposing that, while other grievances of petitioner as to the nature of hearing, evidence, etc., be found without merit, the compensatory payment provisions of section 927.83 of Order No. 27 are invalid *as applied to Northern New Jersey* because the rate of payment is not supported by the evidence upon which the order was amended to include Northern New Jersey. Petitioner, respondent, and the intervenors filed exceptions to the hearing examiner's report and oral argument by the parties and the intervenors was held before the Judicial Officer September 30, 1958.

*Findings of Fact*

1. Petitioner, Suncrest Farms, Inc., is a corporation organized and existing under the laws of the State of Pennsylvania with its address and principal place of business at 1414 Millard Street, Bethlehem, Pennsylvania. It is a handler as defined in Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey milk marketing area and petitioner operates a milk processing or bottling plant in the State of Pennsylvania.

Findings of Fact 2, 3, 4, 5, and 6 in the decision entered in *In re Lehigh Valley Cooperative Farmers*, decided February 17, 1959 (18 A.D. 75), are incorporated herein as similarly numbered Findings of Fact.

7. Upon the basis of the evidence introduced at the hearing, the Deputy Administrator, Agricultural Marketing

Service, filed a recommended decision May 9, 1957 (22 F.R. 3318), and time was given to file exceptions. A decision by the Acting Secretary was filed June 10, 1957, and reads, in part, as follows (22 F.R. 4194, 4207-4208):

"Compensatory payments are payments to the producer settlement fund on milk disposed of in the marketing area from plants which are not pool plants. They are designed to bring substantial equity between the handler and producer of pool milk and the handler and producer of nonpooled milk with respect to sales in the marketing area. The provision for partial regulation through compensatory payments makes it possible for a handler operating outside the marketing area to use the facilities of fully regulated plants for disposing of surplus milk not needed for markets outside of the area without imposing the financial burden of such surplus on producers in the marketwide pool. Compensatory payments also make it possible for a handler outside the marketing area to maintain small amounts of regular sales in the marketing area without subjecting his outside sales to full regulation.

"One objective in drawing boundary lines of the marketing area is to minimize the amount of sales in the area from distributors whose primary business is outside of the area, and also to minimize the amount of distribution outside of the marketing area from plants located within the area whose business is primarily within the marketing area. Complete elimination of such competition, however, is impossible for the New York-Northern New Jersey area regardless of where the line is drawn. As a result, there will be located outside of the marketing area a number of handlers who primarily are supplying customers outside of the marketing area but who historically have served a few customers located within the area. These handlers usually have a relatively high percentage of their milk in fluid milk utilization. To the extent that they are selling

milk within the area, they are competing for sales with handlers located within the area who are fully regulated by the order with respect both to pricing and pooling. Outside of the area, they are competing for sales primarily with handlers located outside of the area who are not regulated by the order. Such handlers located near the borders of the proposed marketing area who receive milk directly from farmers compete for producers with fully regulated handlers some of whose plants are located within the boundaries of the marketing area. Some of such handlers operating plants in the marketing area also have a fluid milk utilization considerably higher than the average utilization for the market as a whole.

"Requiring such outside handler to be fully regulated would mean that he would be required to account to the pool at the full Class I-B price for all of the milk sold outside of the marketing area which is in competition with milk not subject to regulation under the order. Such a requirement for a dealer, whose business primarily is outside of the marketing area, could readily induce him to abandon his sales in the marketing area. Permitting a handler to continue to sell milk to customers in the marketing area without any form of price regulation would give such handler a competitive advantage as compared to the handler whose primary business is within the area and who consequently is fully regulated.

"A proposal was made that such handler outside the marketing area be required only to pay to his producers the utilization value of milk according to the class prices established under the order. That is, that he be required to pay for his milk on a handler pool basis rather than on a marketwide basis. It was contended that such a provision would provide equality between the pool handler and the nonpool handler because their required class prices would be the same. The handler in the area, however, has to equalize his utilization

with other handlers, and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than the utilization of his handler. It would be inequitable to a handler in the marketing area to require him to equalize his utilization while letting a handler outside the marketing area avoid equalization on milk sold in the area. An unfair advantage would accrue to the nonpool handlers in competition for producer supplies, and the entire program of marketwide equalization would be in jeopardy. Although it is not the purpose of the order to bring complete equality between regulated and unregulated handlers, it should at least provide equity between such handlers with respect to milk sold in the marketing area both as to class prices and as to payments to producers.

"Another proposal made was that the handler outside the marketing area be required to pay full compensatory payments provided for under the order on nonpooled milk sold in the marketing area. This would return to such handler a price which would enable him to pay his producers for that particular milk sold in the marketing area about what he could pay if he sold such milk to a manufacturing outlet. It would not, however, affect what he could return to his producers for the balance of his milk. In order not to give the handler located outside the marketing area and distributing a small amount of milk in the marketing area an advantage over the fully regulated handler, and at the same time, to avoid placing such handler the major portion of whose sales is outside of the marketing area in competition with unregulated milk, at an undue disadvantage with his major competition, the order should provide that the outside handler have a choice of either pooling his entire receipts or of paying the full compensatory payment on his sales within the marketing area. The fully regulated handler in the marketing area is protected in either case, and the handler outside the marketing area is placed in a

position of selecting whichever alternative is more favorable in his particular situation. Unless safeguarded, there is danger of this provision constituting a means of pooling surplus milk for other markets through token sales to the marketing area. Accordingly, only those handlers disposing of a substantial percentage of their milk for fluid use should be eligible to exercise the option of being fully regulated. Inasmuch as handlers, not presently regulated under the order and who distribute milk in the marketing area from plants outside the area, have relatively high fluid utilization a percentage requirement of 55 percent in Class I (Class I-A and I-B combined) will not disturb the status of handlers currently selling small amounts of milk in the marketing area, but will eliminate the danger resulting in token sales in the marketing area from plants not engaged primarily in the distribution of fluid milk. This option should not constitute a means by which plants otherwise regulated under another Federal order could jump back and forth between orders to obtain advantages over other handlers under one or both orders because of temporary price differences or to take advantage of differences in pooling provisions of the orders involved. Accordingly, the operator of a plant which except for this option would be regulated under another Federal order should be eligible to exercise the option only if the percentage of its milk in Class I-A exceeds its percentage of Class I-B milk disposed of in the marketing area defined under the other Federal order.

"All handlers located outside the defined marketing area who sell milk in the marketing area would not be required, of course, to choose one of the alternatives heretofore described. Many dealers outside the marketing area who distribute milk in the area are operators of pasteurizing plants, or buy milk from pasteurizing plants whose source of milk is country plants rather than direct receipts from farmers. Some of this country plant milk is milk purchased from plants

which will be fully regulated under the New York-Northern New Jersey order. Under the accounting procedure to be employed, milk received by the pasteurizing plants from pool plants will be allocated first to Class I-A milk distributed in the marketing area. Unless sales in the marketing area by the outside dealer exceeded receipts from pool sources, neither full regulation of the outside dealer nor an obligation to make comepensatory payments would result."

Some of the evidence in support of these findings and conclusions may be found in the promulgation hearing record at pages 12922-31, 12998-99, 13397-410, 13790, 13993-14001, 14168-77, 14248-52, 14658, 14983-87, 15020-29, 15255-57, 15284-85, 15269-70, and 15344-54.

8. The order amending Order No. 27, as amended, was issued by the Assistant Secretary June 27, 1957 (22 F.R. 4643). The amending order reads, in pertinent part, as follows:

"§ 927.3 *Marketing area.* 'New York-New Jersey milk marketing area' (hereinafter called the 'marketing area') means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section * * *.

"(b) The following counties and parts of counties * * * in the State of New Jersey: Bergin; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren."

"§ 927.83 *Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in

amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

"(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

"(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in § 927.65 (h) (2) or (3) was received from the handler's own farm.

"(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

"(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

"(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows: * * *

"(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401 425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the

Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 as similarly adjusted for location. * * *

"(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph * * *.

"(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

"(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80."

9. Petitioner reported to the market administrator for Order No. 27, as amended, that it disposed of approximately 84,000 pounds of milk monthly in the New Jersey part of the New York-New Jersey marketing area and the market administrator billed it for the difference between the Order No. 27, as amended, Class I-A and Class III prices for such milk pursuant to section 927.83 of the order.

This sum is being paid into the Registry of the United States District Court for the Eastern District of Pennsylvania pending the outcome of this litigation. See *United States* v. *Lehigh Valley Cooperative Farmers*, 161 F. Supp. 885 (E.D. Pa. 1957).

10. The act reads, in part, as follows:

> § 8c(5) "*Milk and its products; terms and conditions of orders.* In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> "(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.
>
> "(B) Providing:
>
> "(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them * * *; or
>
> "(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject in either case, only to adjustments for (a) volume, market, and pro-

duction differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time."

§ 8c(7) "*Terms common to all orders.* In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions: • • •

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) and necessary to effectuate the other provisions of such order."

11. Section 900.4 (7 CFR 900.4) of the rules of practice and procedure governing proceedings to formulate marketing agreements and marketing orders reads as follows:

"§ 900.4 *Institution of proceeding*—(a) *Filing and contents of the notice of hearing.* The proceeding shall be instituted by filing the notice of hearing with the hearing clerk. The notice of hearing shall contain a reference to the authority under which the marketing agreement or marketing order is proposed; shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed marketing agreement or marketing order or a description of the subjects and issues involved and shall state the industry, area, and class of persons to be regulated, the time and place of such hearing, and the place where copies of such proposed marketing agreement or marketing order may be obtained or examined. The time of the hearing shall not be less

than 15 days after the date of publication of the notice in the FEDERAL REGISTER, as provided in this subpart, unless the Deputy Administrator shall determine that an emergency exists which requires a shorter period of notice, in which case the period of notice shall be that which the Deputy Administrator may determine to be reasonable in the circumstances: *Provided*, That, in the case of hearings on amendments to marketing agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of publication of the notice in the FEDERAL REGISTER."

12. About four percent of petitioner's receipts of milk is distributed in the marketing area under Order No. 27. Petitioner would have to pay into the producer-settlement fund under Order No. 27 substantially more than the compensatory payments if it were a fully regulated handler under the order.

*Conclusions*

I

Petitioner alleges several procedural irregularities in connection with the issuance of the protested order. Petitioner claims that there was inadequate and defective notice. The contentions are the same as those made in the companion proceeding *In re Lehigh Valley Cooperative Farmers, supra*, and for the reasons given in the decision in that proceeding, which are equally applicable here, the contentions are found to be without controlling merit.

II

Petitioner also urges that the Secretary relied upon the entire record of the promulgation hearings commencing in June 1956 when a separate order for Northern New Jersey was proposed instead of considering only the record evidence of the later hearing sessions dealing with regulation

of Northern New Jersey by amending Order No. 27. Petitioner also challenges the inclusion of Northern New Jersey in the marketing area regulated by Order No. 27 as unsupported by the record evidence. These issues too were raised and decided adversely to petitioner in the *Lehigh Valley Cooperative Farmers* proceeding, *supra*, and for the reasons given in the decision in that proceeding are dismissed here also.

III

This proceeding directly involves the validity of the compensatory payment provision contained in section 927.83 of the order unlike the companion case, AMA Docket No. 27-123, *In re Lehigh Valley Cooperative Farmers*, *supra*.

In order to understand and to place the disputed provision in proper perspective a brief glance at the history and mechanics of Order No. 27 is necessary and appropriate. From the outset, Order No. 27 provided for a marketwide pool and marketwide equalization of producer returns. The order then, as now, contained a scheme whereby each handler paid for milk subject to regulation under the order at class values or prices, differing according to the use he made of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by *all* handlers under the amended order. Each handler pays his producer at the uniform price, and then, through adjustments with the producer-settlement fund kept by the market administrator, brings the total he has paid to producers up to (by paying into the producer-settlement fund) or down to (by receiving money from such fund) the total he is required to pay at class prices. In effect, a handler receives from the producer-settlement fund the amount by which the value of his milk at class prices is less than the value at the blend price and pays into the producer-settlement fund the amount by which the value of his milk at the class prices exceeds the value at the blend price. It is axiomatic that the blend price to producers will be lowered to the extent that higher valued Class I utilization in the

marketing area is allowed to be withheld from pooling by regulated or unregulated handlers and to the extent that lower valued manufacturing milk is pooled.

Order No. 27, as originally enacted, left unpriced and unpooled milk of a handler that was distributed as Class I outside the marketing area covered by the order. See *United States* v. *Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939). Hence, some Class I sales were then not pooled or priced and the blend price to producers was lowered due to the absence of such milk from the pool. The order was amended to include all milk received at a plant approved by any health authority as a source of milk for the marketing area within the pool and all such milk was priced thereunder. See *Titusville Dairy Products Co.* v. *Brannan*, 176 F.2d 332 (3d Cir. 1949), *cert. denied*, 338 U.S. 905 (1949). This type of regulatory scheme resulted in full regulation of all possible sources of milk supply, but it also invited lower valued manufacturing milk into the pool.

The order was further amended to include in the market-wide pool only plants which receive milk from dairy farmers who constitute the regular supply of milk for the fluid needs of the marketing area. This was done by means of defining as pool plants under the order those plants which historically served the marketing area regularly and as their primary market. To protect the effectiveness of such regulatory program in the presence of unpriced and unpooled milk which again created a problem due to the failure to regulate fully all possible sources of milk supply,[1] a provision was included in the order to require payments into the pool, i.e., compensatory payments, on nonpooled milk disposed of in the marketing area under certain conditions. See *Kass* v. *Brannan*, 196 F.2d 791 (2d Cir. 1952), *cert. denied*, 344 U.S. 891 (1952). After the decision in the *Kass* case, the compensatory payment provision of Order

[1] The presence of unregulated milk in a regulated area has long been a major problem in the field of milk regulation. See, e.g., Baldwin v. Seelig, 294 U.S. 499 (1935); Nebbia v. New York, 291 U.S. 502 (1934).

No. 27 was further amended in 1953. A similar provision was incorporated into the amended order effective August 1, 1957, and is here in issue.

In drawing the boundary lines of the regulated area the Secretary sought to minimize the difficulties of treating peripheral milk, that is, to fix an area where there would be a minimum amount of sales in the area by dealers whose principal business was outside the area and a minimum amount of sales outside the area by dealers whose principal business is inside the area. Complete elimination of such competition is impossible, however, regardless of where the lines are drawn. As a result, it was recognized in the decision of the Secretary preceding the disputed amendment that there will be located outside the marketing area a number of handlers who primarily supply customers outside the marketing area but who historically have served a few customers located within the area. We are concerned herein with the manner of treating these handlers. It was further recognized that, to the extent that such handlers do sell milk within the New York-New Jersey marketing area, they are competing for sales with handlers located within the area who are fully regulated and are displacing pool milk in the marketing area. Outside the area these handlers compete for sales primarily with handlers located outside the area who are not regulated by the order.

The decision of the Secretary quoted in part in Finding of Fact 7 concluded that permitting outside handlers to continue to sell milk to customers in the marketing area without any form of price regulation would have detrimental effects upon the operation and objectives of the order. As indicated by the evidence adduced at the promulgation hearing on and after March 5, 1957, the marketwide pool existing under Order No. 27, as amended, carries the long-time and seasonal reserves of milk for numerous secondary markets in Pennsylvania and the Northeastern States. The New York-New Jersey market carries the surplus burden for outside handlers who distribute some milk

of the act. The opinion noted[4] that the purpose of the compensatory payments in issue there was "* * * in the words of Mr. Welden, a witness at the promulgation hearing, 'to insure that the minimum cost [of nonpool milk, cream, etc.] to handlers is the same as the regular class price to handlers of milk received at pool plants * * *.'"

There is under the plan protested here one minimum price fixed by the order for fluid milk sold in the regulated marketing area, namely, Class I-A, and this applies to both pool and nonpool handlers. The point of departure between the two groups is not a different minimum price for the same classification of milk but in the requirements for payment. The nonpool handler is free of all regulation by the order as to the pricing and pooling of his milk except that he is compelled to pay the difference between the Class III and the Class I-A prices (Class II if the use is in this class) into the producer-settlement fund. He is unregulated by the order as to what he pays his dairy farmers for milk received from them.

Section 927.83 of the order gives to producers, as defined in the order, the benefit of the utilization higher than Class III and, in effect, returns to producers the fluid value of milk displaced from such use by the outside handler's disposition of fluid milk in the marketing area. It is the milk subject to classification, pricing and pooling under Order No. 27, that is, milk received at pool plants, with respect to which the declared policy of the act is operative under the order. The Secretary, in promulgating a milk marketing order, must determine which handling of milk must be isolated for the purpose of regulation.

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[4] The opinion noted also that the prescribed payments were due even if milk was not available in the New York market for processing into cream and condensed milk, the fluid products imported in that case from Ohio by a nonpool handler. Section 927.83 of the current order makes the payments inapplicable for any month when the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the Class I-A and Class II volume used in such computation.

*United States* v. *Rock Royal Cooperative, Inc., supra; In re Clover Leaf Dairy Company*, 15 A.D. 339 (1956), *aff'd*, N.D. Ind. September 10, 1958 (17 A.D. 944); *In re Tapor Dairies Company*, 14 A.D. 77 (1955), *aff'd*, N.D. Ohio, Jan. 10 and April 11, 1958 (17 A.D. 78 and 516). See also section 8c(11)(C) of the act (7 U.S.C. 608c(11)(C)). The Secretary may prescribe appropriate standards to designate the dairy farmers or "producers" whose milk is to be subject to the classification, pricing and pooling provisions of an order. Cf. *United States* v. *Wrightwood Dairy Co.*, 127 F.2d 907, 911 (7th Cir. 1942); *Vogt's Dairies, Inc.* v. *Wickard*, 45 F. Supp. 94 (S.D. N.Y. 1942). The order which was the subject of the *Rock Royal* case, *supra*, did not price and pool a handler's milk sold outside the marketing area and it has been recognized that milk disposed of in a regulated marketing area that was received from outside sources may be treated differently from the pricing standpoint than producer milk. *Bailey Farm Dairy Co.* v. *Anderson*, 157 F.2d 87 (8th Cir. 1946), *cert. denied*, 329 U.S. 788 (1946).

Section 8c(5)(A) of the act authorizes terms in an order classifying milk in accordance with use "* * *" and *fixing*, or providing a method for fixing, minimum prices for each such use classification which *all* handlers shall pay * * * for milk purchased from producers or associations of producers. Such prices shall be *uniform* as to all handlers * * *." [Emphasis supplied.] We do not believe that what a nonpool handler may pay his dairy farmers is part of the "minimum price" for a classification *fixed* pursuant to section 8c(5)(A) since there is no fixing, or method prescribed for fixing, what the nonpool handler pays his dairy farmers for milk. Of course too, since milk is a fungible commodity and the identity of a particular farmer's milk is lost at the handler's plant, payment to producers for milk by a handler according to its utilization or classification must be implemented by either a handler pool or a marketwide pool, neither of

which is commanded by the order for the nonpool handler such as petitioner.

Indeed it seems to us that if the kind of partial regulation involved is inconsistent with section 8c(5) of the act it would be for the reason that all the milk received by the nonpool handler from dairy farmers is not classified, priced and pooled as is the case for the fully regulated handler. Petitioner, however, is not seeking this result and it has the option to become regulated fully under the order. We do not think, then, that the provision in controversy is disqualified from being authorized by section 8c(7)(D) of the act for inconsistency with section 8c(5)(A) because we think that section 8c(5) applies to *fully regulated* handlers and not to partially regulated handlers, that is, nonpool handlers such as petitioner.

Petitioner, invoking *Kass*, says that compensatory payments are justified only to keep out "cheap" milk, that the provision in issue assumes that nonpool handlers can obtain milk at the Class III price, that there is no evidence that such is the case and that, on the contrary, the record shows that a nonpool handler's "initial" or "acquisition" cost for milk, distributed in the marketing area is higher than the Class III price. The hearing examiner also concluded that the evidence in the promulgation record shows that the price at which unregulated milk is *available* in and around Northern New Jersey is the uniform[5] price under Order No. 27 or a slightly higher price. Petitioner contends that in its case the Pennsylvania Milk Control Board prices fluid milk leaving Pennsylvania in packaged form as Class I, that petitioner is subject to this pricing on milk sold in the marketing area and that the Pennsylvania Milk Control Board's Class I price is higher than the Order No. 27 Class I-A price.

As we mentioned above, the *Kass* ruling took as the purpose of compensatory payments the statement of a Depart-

[5] "Uniform" in this sense, which is the usual meaning, refers to the marketwide blend price for all utilizations of pool handlers.

ment witness to the effect that the payment provisions were necessary in order to assure equality of cost between pool and nonpool handlers *on the milk or milk products disposed of in the marketing area.* The evidence behind this controverted order and the findings and conclusions of the Secretary in the decision referred to above in Finding of Fact 7 show that there *is more involved than approximating* equality of cost between pool and nonpool handlers with respect to *milk disposed of in the marketing area.* The decision discusses at length the aspects of the problem of peripheral milk concluding, for the reasons given in the decision, that even under a proposed prescription that the nonpool handler pay all his dairy farmers on the basis of the Order No. 27 classified prices, that is, on an individual handler pool basis, "* * * the entire program of marketwide equalization would be in jeopardy * * *." In any event, the price at which milk is available on the open market is not necessarily the sole legal gauge for measuring rates of compensatory payments. Fluid milk dealers buying milk from dairy farmers ordinarily have to pay out to each producer a price in excess of the value of milk for manufacturing purposes although they sometimes, as does petitioner, have to use some surplus in this way.[6] The Class III value remaining to the petitioner here after payment of the difference between Class III and Class I-A to the order pool permits petitioner to return to its dairy farmers the Class III value of the small part of its milk sold in the marketing area. This is the "opportunity" or "alternative use" value which the milk would have if manufactured by petitioner instead of being disposed of as fluid milk in the marketing area. Just as the petitioner would pay its producers an average price per hundredweight in excess of the manufacturing value of the milk manufactured, it may do the same with respect to the milk in controversy. The

[6] In the *Kass* case, the milk products involved were bought not from producers but by a dealer in New York from dealers located in Wisconsin and Ohio for the specific purpose of utilizing the purchased milk products in the marketing area.

Class III value can be blended with the petitioner's valuations for the remaining 96 percent of its milk not disposed of in the marketing area.

But the petitioner says that its cost for the milk disposed of in the marketing area is fixed by the Pennsylvania Milk Control Board at the Pennsylvania Class I price because the Board applies its pricing to milk leaving Pennsylvania in packaged form. The Board has a regulation applicable by its terms to such milk and petitioner apparently is paying the Board's prices. But whether or not the Board *enforces* the regulation as to the milk *subject to compensatory payments under Order No. 27* is not quite clear. But even if it does, we do not see how this can make section 927.83 of the order inapplicable. If otherwise valid, section 927.83 cannot be made invalid by action of the Pennsylvania Milk Control Board since the milk involved is clearly subject to the jurisdiction of the Secretary under the act. If there is accommodation necessary between the Federal regulation and the State regulation on the pricing of the milk it would seem that the accommodation would have to be made in the State, rather than the Federal, regulation.

On the evidence in the proceeding the Secretary found that the terms and provisions of the amended order, including section 927.83, tend to effectuate the declared policy of the act. Of course the act requires in section 8c(4) that such a finding be made on the evidence introduced at a promulgation hearing and section 7(c) of the Administrative Procedure Act (5 U.S.C. 1006(c)) provides that the proponent of an order has the burden of proof. But the proposition to which the necessity of supporting evidence applies is that the order provisions being adopted will *tend to effectuate the declared policy of the act.* We think for the reasons given by the Secretary in the decision and in view of the record evidence, the Secretary's finding is adequately supported by evidence as to the promulgation of section 927.83 to include Northern New Jersey.

We think too that the evidence is sufficient to qualify the

provision under the authority of section 8c(7)(D) of the act.

In addition to the statutory authorizations in section 8c(5) of the act, additional or auxiliary provisions may be included in a milk order under section 8c(7)(D) of the act (7 U.S.C. 608c(7)(D)) if such provisions are:

> "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) and necessary to effectuate the other provisions of such order."

The incidental and necessary powers thus granted the Secretary under the act are substantial (*Grant* v. *Benson*, 229 F.2d 765 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 1015 (1956)) and "necessary" as used in this connection in the act, does not mean indispensable, essential or vital.[7] *Armour & Co.* v. *Wantock*, 323 U.S. 126, 129-132 (1944); *Borden Company* v. *Borella*, 325 U.S. 679, 682-684 (1945); *Roland Electrical Co.* v. *Walling*, 326 U.S. 657, 664 (1946); *In re Beatrice Foods Co.*, 15 A.D. 767 (1956), *aff'd*, *Beatrice Foods Company* v. *Benson* (N.D. Okla. 1957), 16 A.D. 177. The disputed provision, we think, falls within the incidental and necessary authority contained in section 8c(7)(D) of the act. It was incidental to the regulatory plan for pricing and pooling producer milk, as defined in the order, and necessary to protect the integrity of that plan in the New York-New Jersey area. Where the entire potential milk supply for a regulated market is not to be fully regulated by an order, as is the case here, the partial regulation of nonpool milk entering the marketing area for Class I or fluid disposition is necessary to protect the regulatory scheme adopted. In addition to what we have said above, justification for the scheme here is seen in part

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[7] While such is the case, we are of the opinion that the compensatory payment provision in issue was essential and indispensable to the pricing and pooling provisions of the order.

in the marketing area. These handlers usually have a relatively high percentage of their milk in fluid milk utilization and this utilization is considerably higher than the average for the market regulated by Order No. 27. This higher utilization, of course, results in a competitive advantage in milk procurement to the outside handler as against the regulated handler and outside and regulated handlers draw on the same production area for supplies. Furthermore, the regulated handler has to equalize his utilization with other handlers and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than his individual utilization. Completely unregulated distribution in the marketing area by the outside handler would result in a greater advantage to the nonpool handlers in competition for producer supplies and would place the entire program of marketwide equalization in jeopardy. The outside handler could pay producers more than the blend price and pool receipts and the blend price would be lowered accordingly. In addition, to the extent that outside handlers have fluid milk sales in the regulated area, regulated milk is displaced and pool returns to producers are lowered contrary to the declared policy of the act.[2]

The problem thus presented was the potential effect of a destructive nature upon the objectives sought to be accomplished by the order if nonpool milk sold in the marketing area remained completely free from the prescribed minimum prices, pooling, and other order requirements imposed on fully regulated pool milk. A possible answer was the uniform treatment of all handlers distributing any milk in the market, including handlers whose business is conducted primarily outside the marketing area and whose marketing area interests are only incidental, as was done

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[2] See pages of promulgation hearing record listed in Finding of Fact 7 for some of the evidence in support of these findings and conclusions.

earlier to some degree.[3] In this event, all handlers distributing any milk in the market would have been required to pay and pool under the order the appropriate fluid milk price for milk sold as fluid milk wherever sold and regardless of the degree of association of the plant with the New York-New Jersey area. The plan adopted by the Secretary in Order No. 27, as amended, was designed to give a measure of relief from full regulation to a handler such as petitioner, consistent with protection of the integrity of the pricing plan of the order.

Petitioner claims, however, that the compensatory payment provision in issue is unauthorized by the act and is in conflict therewith. Petitioner relies upon *Kass* v. *Brannan*, *supra*, which held that somewhat similar provisions formerly in Order No. 27 were inconsistent with section 8c(5)(A) of the act and therefore could not be justified under the incidental and necessary language of section 8c(7)(D) of the act.

In the *Kass* case the majority ruled that the compensatory payments there involved were part of the "minimum price" as that term is used in section 8(c)(5)(A) of the act, that the "minimum price" of milk to a nonpool handler consists of the "initial" cost plus the compensatory payment, that the "initial" cost of nonpool milk according to the evidence upon which the payment provisions were issued was greater than the credit allowed (Class III price) for the computation of the compensatory payment due, and that, therefore, there was not a uniform price for both pool and nonpool handlers for the same classification of milk contrary to section 8c(5)(A) of the act. Accordingly the plan was held to be inconsistent with section 8c(5)(A) of the act and consequently unauthorized by the incidental and necessary clause of section 8c(7)(D)

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[3] See Titusville Dairy Products Co. v. Brannan, 176 F. 2d 332 (3d Cir. 1949), cert. denied, 338 U.S. 905 (1949).

in the evidence to the effect that the New York-New Jersey pool carries the reserve supply for the nonpool handlers primarily doing business outside the marketing area who call on the pool for milk when needed. On the other hand, in the absence of compensatory payments, there would be the opportunity for nonpool handlers to dispose of their surplus, when they had one, in the marketing area at a disadvantage to the pool producers and handlers.

Petitioner points out that the compensatory payments go into the producer-settlement fund for the benefit of the pool producers under Order No. 27 and are not made to the dairy farmers who deliver milk to petitioner. Petitioner claims that the payments constitute a "penalty" for doing business in the marketing area.[8]

It is of course an essential feature of individual handler and marketwide pools that a particular milk producer does not necessarily receive the value at the classified price of the classification in which his specific milk may be utilized. Justification for the pooling requirement attacked is seen in part in the evidence to the effect that the marketwide pool under Order No. 27 carries the surplus and the reserves for the entire area, including that in which petitioner operates, that is, that Pennsylvania handlers generally trim somewhat their purchases of milk close to their fluid needs and call upon the marketwide pool milk under Order No. 27 for supplemental supplies of fluid milk when they need them. On the other hand, there is the opportunity in the absence of some such provision as section 927.83(b)(1) for a nonpool handler to dispose of his surplus[9] when

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[8] For a discussion with respect to compensatory payments in the light of section 8c(5)(G) of the act (7 U.S.C. 608c(5)(G)) see In re The Lawson Milk Company, 17 A.D. 239, 260-261 (1958).

[9] While it may be argued that petitioner does not dispose of "surplus" milk in the marketing area because it had customers for fluid milk in the area before the issuance of the contested order, the issuance of the order constituted rule-making and the validity of the order provisions must be tested as to supporting evidence, reasonableness, etc., not on the basis of petitioner's particular situ-

he has any say in the regulated marketing area under Order No. 27. One of the principles involved, then, is that the pool producers who carry the burden of the reserve supply for nonpool plants should have the benefit of the fluid value of sales of Class I milk in the regulated area by plants selling milk of dairy farmers who do not carry their full share of the surplus for the entire area and who displace pooled milk in Class I sales in the marketing area operating under a marketwide pool.

In view of the foregoing, the petition should be dismissed. All contentions of petitioner presented for the record have been considered and whether or not specifically mentioned herein, any objections, exceptions, suggestions, requests, etc., inconsistent with this decision are denied.

*Order*

Accordingly, the relief requested by petitioner is denied and the petition is dismissed.

Copies hereof shall be served upon the parties and the Market Administrator for Order No. 27, as amended.

Done at Washington, D. C. March 3, 1959.

THOMAS J. FLAVIN,
*Judicial Officer.*

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ation as disclosed herein but on the basis of the promulgation record. Dairymen's League Cooperative Association, Inc. v. Brannan, 173 F. 2d 57 (2d Cir. 1949), cert. denied, 338 U.S. 825 (1949); Acme Fast Freight, Inc. v. United States, 7 Pike & Fischer Admin. Law (2d) 186, 187 (S.D. N.Y. 1957).

BILL OF COMPLAINT (LEHIGH VALLEY)

Civil Action No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, PLAINTIFF,

*v.*

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, DEFENDANT

BILL OF COMPLAINT

AND NOW this 9th day of March, 1959 comes Lehigh Valley Cooperative Farmers and by its attorneys, Daniels and Swope, and Weston C. Overholdt, Jr., files this Bill of Complaint pursuant to the provisions of Subsection 15(B) of Section 8c of the Agricultural Adjustment Act of 1933, as amended, and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C.A. 601 et seq.), and respectfully represents:

1. Plaintiff, Lehigh Valley Cooperative Farmers, is a corporation organized under the cooperative laws of Pennsylvania, having its address and principal place of business at Allentown, Pennsylvania.

2. Plaintiff operates a processing and bottling plant in Allentown, Pennsylvania, and distributes, and has so distributed for more than 25 years, bottled milk in Phillipsburg, New Jersey, and environs, which territory since August 1, 1957, has been included in the marketing area (Section 927.3) of Order No. 27.

3. The Defendant, Ezra Taft Benson, is the Secretary of Agriculture of the United States of America.

4. Order No. 27, as amended, heretofore issued by the Defendant, regulates the handling of milk in the New York-New Jersey Milk Marketing Area, as defined in said Order.

5. The Defendant promulgated certain amendments to Order No. 27, which became effective on August 1, 1957. The said Order as amended is marked Exhibit "A", and made a part hereof.

6. The amendments to Order No. 27 to which Plaintiff herein objects are Section 927.3, dealing with the Market-

ing Area insofar as it includes any part of Northern New Jersey, and Section 927.83.

7. The Defendant issued the amendments to Order No. 27 which became effective August 1, 1957, upon a record established at a hearing which began June 16, 1956.

8. The notice of said hearing, which notice was dated May 18, 1956, stated that the issues to be tried were whether Northern New Jersey should have either no Order, or a separate Order regulating Northern New Jersey only, and the terms such an Order should contain. The hearing on these issues covered 84 hearing days, and between 11,000 and 12,000 pages of testimony.

9. The Secretary, on February 28, 1957, issued an additional notice of hearing raising the additional issue of whether existing Order No. 27 should be amended to include Northern New Jersey as part of the Metropolitan New York Marketing Area. The hearing on this new question was fixed for March 5, 1957.

10. The Rules and Regulations issued pursuant to the applicable statutes providing for notice of hearing require the Secretary to give fifteen (15) days notice where an area is to be regulated for the first time.

11. The notice, issued February 28, 1957, gave interested parties concerned with Northern New Jersey and operating in Northern New Jersey only five (5) days notice.

12. The Secretary announced in his call of February 28, 1957, that the entire record established since June 16, 1956 would be used in determining, among other questions, whether or not Northern New Jersey should become part of the Metropolitan New York Marketing Area of Order No. 27, which question was not at issue prior to March 5, 1957.

13. The Secretary promulgated amendments to Order No. 27 to be effective August 1, 1957, by which Northern New Jersey was included in the Marketing Area of Order No. 27 (Section 927.3 of the Order).

14. There is no evidence in the promulgation record nor in the 15(A) record that milk could be bought in Northern

New Jersey or Eastern Pennsylvania for the Class III price.

15. The Secretary, in Section 927.83, provided that the Plaintiff and others similarly situated would be required to pay into the Producer-Settlement Fund for distribution among other producers, the difference between the prices established in Order 27 for Class I and Class III milk.

16. The record of both the promulgation hearing and the 15(A) hearing establish that the Plaintiff pays for its milk far in excess of either the class prices or the blend prices established by Order 27.

17. The Secretary erred in the promulgation of Section 927.83 insofar as it requires the Plaintiff, and others similarly situated to pay into the Producer-Settlement Fund the difference between Order 27 Class I and Class III prices where the Plaintiff paid more than the Class III prices for the milk that it purchased and sold in the Marketing Area as Class I milk.

18. The Secretary erred in giving interested parties only five (5) days notice, where the territory of Northern New Jersey was considered for regulation as part of Order No. 27 for the first time.

19. The Secretary erred in using the entire record beginning with June 16, 1956 and ending March 29, 1957, as a basis for including Northern New Jersey as a part of the Marketing Area of Order No. 27 (Section 927.3) and in using the entire record as a basis for the promulgation of Section 927.83.

20. Plaintiff, pursuant to its administrative remedy under Section 8c(15)(A), on August 1, 1957, filed a petition with the Secretary of Agriculture, Docket No. 27-123. A copy is hereto attached, marked Exhibit "B", and made a part hereof. A hearing was held October 24, 1957, before Jack W. Bain, Hearing Examiner, Office of the Hearing Examiners, United States Department of Agriculture.

21. The Plaintiff, through Counsel, during the hearing which began March 5, 1957, asked the Presiding Officer to recall prior witnesses for cross examination on the new

issue raised, which was not at issue when the witnesses had originally testified. It was also requested of the Hearing Examiner that the hearing not proceed on the amended call of February 28, 1957, raising the new issue. Both requests were denied.

22. The Secretary erred in sustaining the ruling of the Presiding Officer, and, consequently, the Plaintiff was denied a full and adequate hearing. The Judicial Officer erred in sustaining the Secretary's position.

23. The Hearing Examiner, Jack W. Bain, in his Report and Proposed Order, ruled that the notice of February 28, 1957, did not comply with the Rules and Regulations concerning notice of hearing affecting new territory, and that no testimony taken prior to March 5, 1957 could properly be used as a basis for amendments to Order No. 27, so far as regulating Northern New Jersey was concerned. His Report, however, held that there was sufficient evidence after March 5, 1957 to sustain Section 927.3. He further held that the rights of Plaintiff were not prejudiced by the improper notice. However, he held Section 927.83 invalid as the record did not support it.

24. Exceptions were filed by Plaintiff to that part of the Hearing Examiner's Report and Proposed Order which held Section 927.3 valid. They were subsequently argued before Thomas J. Flavin, Judicial Officer, United States Department of Agriculture, September 30, 1958.

25. On February 17, 1959, the aforesaid Judicial Officer issued a Decision and Order, sustaining the Hearing Examiner as to Section 927.3, and reversed and refused to adopt the Hearing Examiner's proposed action as to Section 927.83, and dismissed the Plaintiff's petition, and denied the relief requested.

26. According to the provisions of Order No. 27, as amended, Plaintiff Lehigh Valley Cooperative Farmers, is a handler (not a pool plant).

27. Defendant has demanded and continues to demand through the Market Administrator for the New York-New Jersey Milk Marketing Area, that Plaintiff conform to and

comply with the provisions of Order No. 27, as amended, particularly Section 927.83.

28. There was no substantive testimony in the promulgation hearing, or in the hearing on the Petition, Docket No. 27-123, which would support Section 927.83.

29. The Defendant, the Hearing Examiner and the Judicial Officer erred in holding that Plaintiff was not prejudiced by the five (5) days notice, when the Rules and Regulations called for fifteen (15) days notice.

30. The Judicial Officer erred in holding that Section 900.4 of the Rules of Practice did not apply to an amended hearing call even though that amendment put at issue for the first time a new territory to be a part of the former Marketing Area of Order No. 27.

31. The Judicial Officer erred in holding that the five (5) days notice was a reasonable notice within the meaning of that term as used in Sections 8c(3) and (4) of the Marketing Agreement Act of 1937, as amended, and Section 4 of the Administrative Procedures Act (5 U.S.C. 1003).

32. The Hearing Examiner correctly held that the Secretary was in error to rely upon any part of the record established between June 16, 1956 and March 5, 1957 for promulgation of Sections 927.3 and 927.83.

33. The Hearing Examiner erred in holding Section 927.3 valid as being supported by sufficient testimony developed in the record between March 5, 1957 and March 29, 1957, inasmuch as the Secretary in the promulgation of these two sections did not use this part of the record solely as the basis for his decision. The Hearing Examiner placed himself in this respect in the position of the Secretary promulgating the Order in the first instance, which was beyond his jurisdiction and authority.

34. The Judicial Officer erred in affirming the action of the Hearing Examiner as set out in Paragraph 33 of this Complaint, and erred in not affirming the Hearing Examiner in the action set out in Paragraph 32 of this Complaint.

35. The Judicial Officer erred in holding that it was not demonstrated that the Secretary had relied on any part of the record established prior to March 5, 1957, inasmuch

as the Secretary in issuing his amended call, which appeared at page 1219 of Vol. 22 No. 40 of the Federal Register, issued February 28, 1957, in part stated as follows:

> "... notice is given that the notices heretofore issued are hereby amended to include consideration of whether on the basis of the entire record in this proceeding a single marketing agreement and order regulating the handling of milk for a marketing area consisting of all the territory of the state of New York and New Jersey ..."

36. The Judicial Officer erred in not affirming and adopting the Hearing Examiner's decision that Section 927.83 was invalid, and further erred in dismissing Plaintiff's petition and denying the requested relief.

37. The Judicial Officer erred in holding that the Plaintiff was subjected to the prices fixed under Order 61 (Philadelphia Order) and that it would be credited with the amounts paid to the Producer's Settlement Fund under Order 27. This provision of Order 61 affects proprietary handlers.

38. The Plaintiff was not afforded reasonable notice that Northern New Jersey might become part of the then existing Marketing Area of Order No. 27, and were lulled into a sense of false security by a statement of policy issued by the Secretary of Agriculture dated February 29, 1956 (21 FR 1418) which reads in part as follows:

> "I have decided that adequate regulation of the whole area can be gained more certainly and more expeditiously by holding a hearing for consideration of a separate order for the New Jersey area ..."

39. A hearing call consistent with this statement of policy was then issued and the Hearing Examiner ruled that the testimony taken could not result in a single Order or an amendment to Order No. 27 including any part of Northern New Jersey. This position was steadfastly adhered to until March 5, 1957, when the Hearing Examiner

ruled that since the hearing call was amended as of February 28, 1957, the record previously established could now be used in resolving the question of including Northern New Jersey as part of the Marketing Area for Order No. 27. The Hearing Examiner erred in this ruling.

40. The Hearing Examiner erred in denying a request that the hearing not proceed under the amended call dated February 28, 1957.

41. The Judicial Officer erred in holding that the provisions of an order regulating the Plaintiffs' business would have been the same, had a separate Order for Northern New Jersey been promulgated. There is no way in which the Judicial Officer would know this. The facts surrounding Northern New Jersey as a separate Marketing Area would certainly negate such a conclusion.

42. The Hearing Examiner, the Judicial Officer and the Secretary of Agriculture erred in holding that the promulgation of Section 927.3 and Section 927.83 would tend to effectuate the purposes of the Agricultural Marketing Agreement Act of 1937, as amended.

43. The Secretary erred in relying upon the whole record established from June 16, 1956 through March 29, 1957 in the promulgation of the amendment to Order No. 27, insofar as it affected Northern New Jersey.

44. The action of the Secretary in the promulgation of Sections 927.3 and 927.83 was arbitrary, capricious and invalid, being in violation of the Marketing Agreement Act of 1937, as amended, the Administrative Procedures Act, and the Rules and Regulations issued pursuant to these Acts; and unconstitutional, being a violation of the 5th Amendment of the United States Constitution.

WHEREFORE, Plaintiff respectfully prays:

1. That your Honorable Court review the Order of the Judicial Officer in the office of the Secretary of Agriculture of the United States denying relief to the Plaintiff, and dismissing the Petition of Plaintiff.

2. That your Honorable Court find that the aforesaid

amendments to Order No. 27 are illegal and unconstitutional.

3. That your Honorable Court reverse and set aside the Order of the Judicial Officer.

4. And for such other relief as the Court may deem fit and proper.

Respectfully submitted,

LEHIGH VALLEY COOPERATIVE FARMERS,
By GLEN A. BOGER.

DANIELS AND SWOPE,
By WILLIS F. DANIELS,
WESTON C. OVERHOLT, JR.,
*Attorneys for Plaintiff.*

Dated: March 9, 1959.

AFFIDAVIT

STATE OF PENNSYLVANIA,
County of Lehigh, ss:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, Glen A. Boger, who being duly sworn according to law deposes and says that he is President of Lehigh Valley Cooperative Farmers, a corporation, Plaintiff named in the foregoing Bill of Complaint, and that the averments contained therein are true and correct to the best of his knowledge, information and belief, and that this Bill of Complaint is filed in good faith and is not made for the purposes of delay.

GLEN A. BOGER.

Sworn to and subscribed before me this 9th day of March, 1959.

GEORGE A. BAUMER,
*Notary Public*

My Commission Expires: Jan. 20, 1962.

ANSWER (RE LEHIGH VALLEY)

CIVIL ACTION No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, PLAINTIFF,

*v.*

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES, DEFENDANT

ANSWER

The defendant, Ezra Taft Benson, Secretary of Agriculture of the United States, answering the complaint herein, alleges as follows:

I

This is an action brought by plaintiff under authority contained in § 8c(15)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(B)), to review a ruling made by the Judicial Officer of the United States Department of Agriculture, dismissing on the merits a petition previously filed by the plaintiff under § 8c(15)(A) of said act. The Judicial Officer acted as and for the Secretary of Agriculture of the United States pursuant to duly delegated authority (10 F.R. 13769, 11 F.R. 177A-233, 18 F.R. 3219, 18 F.R. 3648 and 19 F.R. 74).

II

In this statutory review proceeding the court's jurisdiction is limited to a determination of whether, on the record before the Judicial Officer, the ruling of the Judicial Officer is in accordance with law. The ruling of the Judicial Officer is final and conclusive if there is substantial evidence in such record supporting the ruling. The Court may not weigh the evidence and substitute its own independent findings for those of the Judicial Officer. A trial *de novo* cannot be conducted nor any new issues be injected in this review action.

III

There will be filed in the office of the Clerk of this court a certified copy of the record in the proceedings had in the Department of Agriculture in connection with the aforesaid petition of the plaintiff under § 8c(15)(A) of the act, this being the record upon which the said ruling of the Judicial Officer was based.

IV

The defendant, for the complete text of the applicable provisions of Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey marketing area, as effective during the period here in controversy, respectfully refers to the full and complete terms thereof as published in the Federal Register (22 F.R. 4643) and in the Code of Federal Regulations (7 CFR 927), and as included in the certified record referred to in paragraph III of this answer.

V

As set forth in paragraph II of this answer, issues of fact on the merits of the controversy are not triable initially or *de novo* in this review proceeding. Accordingly, the defendant avers that he is not required to admit or deny the allegations contained in the complaint. To the extent that admissions or denials may be required under Rule 8(d) of the Rules of Civil Procedure, the allegations contained in the complaint are generally denied except that defendant admits such facts stated therein as were also found in the findings, conclusions, ruling and order of the Judicial Officer in the manner and to the extent set forth in such ruling.

VI

The defendant denies each and every allegation of the complaint, expressed or implied, that the ruling of the Judicial Officer sought to be reviewed herein is not in accordance with law, and avers that the Judicial Officer's

findings, conclusions, ruling and order are in all respects in accordance with law.

VII

There is now pending in this Court an enforcement action pursuant to Sec. 8a(6) of the act styled *United States* v. *Lehigh Valley Cooperative Farmers and Suncrest Farms, Inc.*, Civil Action No. 23268 in which a temporary decree has been entered requiring certain monies to be paid into the Registry of the Court. It is requested, therefore, that such enforcement action be consolidated with this action by way of counterclaim so that all questions may be resolved in such consolidated actions.

WHEREFORE, the defendant demands:

1. That the enforcement action, Civil No. 23268, be consolidated with this action by way of counterclaim;
2. That the relief requested by the plaintiff in the complaint herein be denied and the complaint dismissed on the merits with costs;
3. That the court, after proper review, adjudge, decree and declare the ruling, decision and order of the Judicial Officer to be in accordance with law; and
4. That the defendant be given all such other, further and different relief that the Court may deem just and proper.

HAROLD K. WOOD,
*United States Attorney.*
RICHARD REIFSNYDER,
*Assistant United States Attorney.*

JOHN M. DURBIN,
*Attorney, Office of the General Counsel,*
*U. S. Department of Agriculture,*
*Washington 25, D. C.*

BILL OF COMPLAINT (RE SUNCREST)

Civil Action No. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, DEFENDANT

BILL OF COMPLAINT

AND NOW, this 20th day of March, 1959 comes Suncrest Farms, Inc., and by its attorneys, Daniels and Swope, and Weston C. Overholt, Jr., files this Bill of Complaint pursuant to the provisions of Subsection 15(B) of Section 8c of the Agricultural Adjustment Act of 1933, as amended, and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C.A. 601 et seq.), and respectfully represents:

1. Plaintiff, Suncrest Farms, Inc., is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at Butztown, Pennsylvania.

2. Plaintiff operates a processing and bottling plant in Butztown, Pennsylvania, and distributes, and has so distributed for many years bottled milk in Phillipsburg, New Jersey and environs, which territory since August 1, 1957, has been included in the Marketing Area (Section 927.3) of Order No. 27.

3. The Defendant, Ezra Taft Benson, is the Secretary of Agriculture of the United States of America.

4. Order No. 27, as amended, heretofore issued by the Defendant, regulates the handling of milk in the New York-New Jersey Milk Marketing Area, as defined in said Order.

5. The Defendant promulgated certain amendments to Order No. 27, which became effective on August 1, 1957. The said Order as amended is marked Exhibit "A", and made a part hereof.

6. The amendments to Order No. 27 to which Plaintiff herein objects are Section 927.3, dealing with the Marketing Area insofar as it includes any part of Northern New Jersey, and Section 927.83.

7. The Defendant issued the amendments to Order No. 27 which became effective August 1, 1957, upon a record established at a hearing which began June 18, 1956.

8. The notice of said hearing, which notice was dated May 18, 1956, stated that the issues to be tried were whether Northern New Jersey should have either no Order, or a separate Order regulating Northern New Jersey only, and the terms such an Order should contain. The hearing on these issues covered 85 hearing days and between 11,000 and 12,000 pages of testimony.

9. The Secretary, on February 28, 1957, issued an additional notice of hearing raising the additional issue of whether existing Order No. 27 should be amended to include Northern New Jersey as part of the Metropolitan New York Marketing Area. The hearing on this new question was fixed for March 5, 1957.

10. The Rules and Regulations issued pursuant to the applicable statutes providing for notice of hearing require the Secretary to give fifteen (15) days notice where an area is to be regulated for the first time.

11. The notice, issued February 28, 1957, gave interested parties concerned with Northern New Jersey and operating in Northern New Jersey only five (5) days notice.

12. The Secretary announced in his call of February 28, 1957, that the entire record established since June 18, 1956 would be used in determining, among other questions, whether or not Northern New Jersey should become part of the Metropolitan New York Marketing Area of Order No. 27, which question was not at issue prior to March 5, 1957.

13. The Secretary promulgated amendments to Order No. 27 to be effective August 1, 1957, by which Northern

New Jersey was included in the Marketing Area of Order No. 27 (Section 927.3 of the Order).

14. There is no evidence in the promulgation record nor in the 15(A) record that milk could be bought in Northern New Jersey or Eastern Pennsylvania for the Class III price.

15. The Secretary, in Section 927.83, provided that the Plaintiff and others similarly situated would be required to pay into the Producer Settlement Fund for distribution among other producers, the difference between the prices established in Order No. 27 for Class I and Class III milk.

16. The record of both the promulgation hearing and the 15(A) hearing establish that the Plaintiff pays for its milk far in excess of either the class prices or the blend prices established by Order No. 27.

17. The Secretary erred in the promulgation of Section 927.83 insofar as it requires the Plaintiff, and others similarly situated, to pay into the Producer Settlement Fund the difference between Order No. 27 Class I and Class III prices where the Plaintiff paid more than the Class III prices for the milk that it purchased and sold in the Marketing Area as Class I milk.

18. The Secretary erred in giving interested parties only five (5) days notice, where the territory of Northern New Jersey was considered for regulation as part of Order No. 27 for the first time.

19. The Secretary erred in using the entire record beginning with June 18, 1956 and ending March 29, 1957, as a basis for including Northern New Jersey as a part of the Marketing Area of Order No. 27 (Section 927.3) and in using the entire record as a basis for the promulgation of Section 927.83.

20. Plaintiff, pursuant to its administrative remedy under Section 8c(15)(A), on August 1, 1957, filed a petition with the Secretary of Agriculture, Docket No. 27-121. A copy is hereto attached, marked Exhibit "B", and made a part hereof. A hearing was held October 24, 1957, before Jack

W. Bain, Hearing Examiner, Office of the Hearing Examiners, United States Department of Agriculture.

21. The Plaintiff, through Counsel, during the hearing which began March 5, 1957, asked the Presiding Officer to recall prior witnesses for cross examination on the new issue raised, which was not at issue when the witnesses had originally testified. It was also requested of the Hearing Examiner that the hearing not proceed on the amended call of February 28, 1957, raising the new issue. Both requests were denied.

22. The Secretary erred in sustaining the ruling of the Presiding Officer, and consequently, the Plaintiff was denied a full and adequate hearing. The Judicial Officer erred in sustaining the Secretary's position.

23. The Hearing Examiner, Jack W. Bain, in his Report and Proposed Order, ruled that the notice of February 28, 1957, did not comply with the Rules and Regulations concerning notice of hearing affecting new territory, and that no testimony taken prior to March 5, 1957 could properly be used as a basis for amendments to Order No. 27, so far as regulating Northern New Jersey was concerned. His Report, however, held that there was sufficient evidence after March 5, 1957, to sustain Section 927.3. He further held that the rights of Plaintiff were not prejudiced by the improper notice. However, he held Section 927.83 invalid as the record did not support it.

24. Exceptions were filed by Plaintiff to that part of the Hearing Examiner's Report and Proposed Order which held Section 927.3 valid. They were subsequently argued before Thomas J. Flavin, Judicial Officer, United States Department of Agriculture, September 30, 1958.

25. On March 3, 1959, the aforesaid Judicial Officer issued a Decision and Order, sustaining the Hearing Examiner as to Section 927.3, and reversed and refused to adopt the Hearing Examiner's proposed action as to Section 927.83, and dismissed the Plaintiff's petition, and denied the relief requested.

26. According to the provisions of Order No. 27, as amended, Plaintiff Suncrest Farms, Inc. is a handler, but not a pool plant.

27. Defendant has demanded and continues to demand through the Market Administrator for the New York-New Jersey Milk Marketing Area, that Plaintiff conform to and comply with the provisions of Order No. 27, as amended, particularly Section 927.83.

28. There was no substantive testimony in the promulgation hearing, or in the hearing on the Petition, Docket No. 27-121, which would support Section 927.83.

29. The Defendant, the Hearing Examiner and the Judicial Officer erred in holding that Plaintiff was not prejudiced by the five (5) days notice, when the Rules and Regulations called for fifteen (15) days notice.

30. The Judicial Officer erred in holding that Section 900.4 of the Rules of Practice did not apply to an amended hearing call even though that amendment put at issue for the first time a new territory to be a part of the former Marketing Area of Order No. 27.

31. The Judicial Officer erred in holding that the five (5) days notice was a reasonable notice within the meaning of that term as used in Sections 8c(3) and (4) of the Marketing Agreement Act of 1937, as amended, and Section 4 of the Administrative Procedures Act (5 U.S.C. 1003).

32. The Hearing Examiner correctly held that the Secretary was in error to rely upon any part of the record established between June 18, 1956 and March 5, 1957 for promulgation of Sections 927.3 and 927.83.

33. The Hearing Examiner erred in holding Section 927.3 valid as being supported by sufficient testimony developed in the record between March 5, 1957 and March 29, 1957, inasmuch as the Secretary in the promulgation of these two sections did not use this part of the record solely as the basis for his decision. The Hearing Examiner placed himself in this respect in the position of the Secretary

promulgating the Order in the first instance, which was beyond his jurisdiction and authority.

34. The Judicial Officer erred in affirming the action of the Hearing Examiner as set out in Paragraph 33 of this Complaint, and erred in not affirming the Hearing Examiner in the action set out in Paragraph 32 of this Complaint.

35. The Judicial Officer erred in holding that it was not demonstrated that the Secretary had relied on any part of the record established prior to March 5, 1957, inasmuch as the Secretary in issuing his amended call, which appeared at page 1219 of Vol. 22, No. 40 of the Federal Register, issued February 28, 1957, in part stated as follows:

> ". . . notice is given that the notices heretofore issued are hereby amended to include consideration of whether on the basis of the entire record in this proceeding a single marketing agreement and order regulating the handling of milk for a marketing area consisting of all the territory of the state of New York and New Jersey . . ."

36. The Judicial Officer erred in not affirming and adopting the Hearing Examiner's decision that Section 927.83 was invalid, and further erred in dismissing Plaintiff's petition and denying the requested relief.

37. The Plaintiff was not afforded a reasonable notice that Northern New Jersey might become part of the then existing Marketing Area of Order No. 27 and were lulled into a sense of false security by a statement of policy issued by the Secretary of Agriculture dated February 29, 1956 (21 FR 1418) which reads in part as follows:

> "I have decided that adequate regulation of the whole area can be gained more certainly and more expeditiously by holding a hearing for consideration of a separate order for the New Jersey area. . . ."

38. A hearing call consistent with this statement of policy was then issued, and the Hearing Examiner ruled

that the testimony taken could not result in a single Order or an amendment to Order No. 27 including any part of Northern New Jersey. This position was steadfastly adhered to until March 5, 1957, when the Hearing Examiner ruled that since the hearing call was amended as of February 28, 1957, the record previously established could now be used in resolving the question of including Northern New Jersey as part of the Marketing Area for Order No. 27. The Hearing Examiner erred in this ruling.

39. The Hearing Examiner erred in denying a request that the hearing not proceed under the amended call dated February 28, 1957.

40. The Judicial Officer erred in holding that the provisions of an order regulating the Plaintiffs' business would have been the same, had a separate Order for Northern New Jersey been promulgated. There is no way in which the Judicial Officer would know this. The facts surrounding Northern New Jersey as a separate marketing area would certainly negate such a conclusion.

41. The Hearing Examiner, the Judicial Officer and the Secretary of Agriculture erred in holding that the promulgation of Section 927.3 and Section 927.83 would tend to effectuate the purposes of the Agricultural Marketing Agreement Act of 1937, as amended.

42. The Secretary erred in relying upon the whole record established from June 18, 1956 through March 29, 1957 in the promulgation of the amendment to Order No. 27, insofar as it affected Northern New Jersey.

43. The Judicial Officer erred in holding that fluid milk sales of the Plaintiff "displaces" such sales of milk by handlers whose plants are located in the Marketing Area, for the reason that Plaintiff has been a seller of substantial quantities of fluid milk in the Phillipsburg, New Jersey area for many years.

44. The Judicial Officer erred in not finding that Plaintiff is required under the Pennsylvania Milk Control Law to pay more for its milk sold in both the New Jersey and Pennsylvaania markets than it would be required to pay

under the pricing provisions of Order No. 27, as amended.

45. The Judicial Officer erred in not finding that Plaintiff in fact did and does pay more for its milk sold in both the New Jersey and Pennsylvania markets than it would be required to pay under the pricing provisions of Order No. 27, as amended.

46. The Judicial Officer erred in holding that Plaintiff's Class IA milk, if not sold in the Marketing Area, would have an "opportunity" or "alternative use" value which would be the manufacturing value, for the following reasons:

A. The record established that historically Plaintiff has sold this milk in the Marketing Area as now defined, and

B. There is no evidence in the record to show what disposition would be made of this milk were it not sold in the Marketing Area.

47. The Judicial Officer erred in not finding that the promulgation of compensatory payment provision is beyond the statutory authority granted the Secretary by the Marketing Agreement Act of 1937, as amended.

48. The action of the Secretary in the promulgation of Sections 927.3 and 927.83 was arbitrary, capricious and invalid, being in violation of the Marketing Agreement Act of 1937, as amended, the Administrative Procedures Act, and the Rules and Regulations issued pursuant to these Acts; and unconstitutional, being a violation of the Fifth Amendment of the United States Constitution.

WHEREFORE, Plaintiff respectfully prays:

1. That your Honorable Court review the Order of the Judicial Officer in the Office of the Secretary of Agriculture of the United States denying relief to the Plaintiff, and dismissing the Petition of Plaintiff.

2. That your Honorable Court find that the aforesaid amendments to Order No. 27 are illegal and unconstitutional.

3. That your Honorable Court reverse and set aside the Order of the Judicial Officer.

4. And for such other relief as the Court may deem fit and proper.

Respectfully submitted,

SUNCREST FARMS, INC.
By CLIFTON E. MOWRER,
*President.*

DANIELS and SWOPE,
By WILLIS F. DANIELS
WESTON C. OVERHOLT, JR.
*Attorneys for Plaintiff.*

Dated: March 20, 1959.

AFFIDAVIT

STATE OF PENNSYLVANIA,
County of Dauphin, ss:

Personally appeared before me, a Notary Public in and for the County and State aforesaid, Clifton E. Mowrer, who being first duly sworn according to law, deposes and says that he is President of Suncrest Farms, Inc., a corporation, Plaintiff named in the foregoing Bill of Complaint, and that the averments contained therein are true and correct to the best of his knowledge, information and belief, and that this Bill of Complaint is filed in good faith and is not made for the purposes of delay.

CLIFTON E. MOWRER,
*Pres.*

Sworn to and subscribed before me this 19th day of March, 1959.

MRS. ALBERTA E. HOLLINGSWORTH,
*Notary Public.*

My Commission expires: 2-4-62.

ANSWER (RE SUNCREST)

CIVIL ACTION NO. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

ANSWER

The defendant, Ezra Taft Benson, Secretary of Agriculture of the United States, answering the complaint herein, alleges as follows:

I

This is an action brought by plaintiff under authority contained in § 8c(15)(B) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c(15)(B)), to review a ruling made by the Judicial Officer of the United States Department of Agriculture, dismissing on the merits a petition previously filed by the plaintiff under § 8c(15)(A) of said act. The Judicial Officer acted as and for the Secretary of Agriculture of the United States pursuant to duly delegated authority (10 F.R. 13769, 11 F.R. 177A-233, 18 F.R. 3219, 18 F.R. 3648 and 19 F.R. 74).

II

In this statutory review proceeding the Court's jurisdiction is limited to a determination of whether, on the record before the Judicial Officer, the ruling of the Judicial Officer is in accordance with law. The ruling of the Judicial Officer is final and conclusive if there is substantial evidence in such record supporting the ruling. The Court may not weigh the evidence and substitute its own independent findings for those of the Judicial Officer. A trial *de novo* cannot be conducted nor any new issues be injected in this review action.

III

There will be filed in the office of the Clerk of this court a certified copy of the record in the proceedings had in the Department of Agriculture in connection with the aforesaid petition of the plaintiff under § 8c(15)(A) of the act, this being the record upon which the said ruling of the Judicial Officer was based.

IV

The defendant, for the complete text of the applicable provisions of Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey marketing area, as effective during the period here in controversy, respectfully refers to the full and complete terms thereof as published in the Federal Register (22 F.R. 4643) and in the Code of Federal Regulations (7 CFR 927), and as included in the certified record referred to in paragraph III of this answer.

V

As set forth in paragraph II of this answer, issues of fact on the merits of the controversy are not triable initially or *de novo* in this review proceeding. Accordingly, the defendant avers that he is not required to admit or deny the allegations contained in the complaint. To the extent that admissions or denials may be required under Rule 8(d) of the Rules of Civil Procedure, the allegations contained in the complaint are generally denied except that defendant admits such facts stated therein as were also found in the findings, conclusions, ruling and order of the Judicial Officer in the manner and to the extent set forth in such ruling.

VI

The defendant denies each and every allegation of the complaint, expressed or implied, that the ruling of the Judicial Officer sought to be reviewed herein is not in accordance with law, and avers that the Judicial Officer's findings,

conclusions, ruling and order are in all respects in accordance with law.

VII

There is now pending in this Court an enforcement action pursuant to Sec. 8a(6) of the act styled *United States* v. *Lehigh Valley Cooperative Farmers and Suncrest Farms, Inc.*, Civil Action No. 23268 in which a temporary decree has been entered requiring certain monies to be paid into the Registry of the Court. It is requested, therefore, that such enforcement action be consolidated with this action by way of counterclaim so that all questions may be resolved in such consolidated actions.

WHEREFORE, the defendant demands:

1. That the enforcement action, Civil No. 23268, be consolidated with this action by way of counterclaim;
2. That the relief requested by the plaintiff in the complaint herein be denied and the complaint dismissed on the merits with costs;
3. That the court, after proper review, adjudge, decree and declare the ruling, decision and order of the Judicial Officer to be in accordance with law; and
4. That the defendant be given all such other, further and different relief that the Court may deem just and proper.

HAROLD K. WOOD,
*United States Attorney.*

RICHARD REIFSNYDER,
*Assistant United States Attorney.*

JOHN M. DURBIN, *Attorney,*
*Office of the General Counsel,*
*U. S. Department of Agriculture,*
*Washington 25, D. C.*

COMPLAINT (RE ENFORCEMENT)

Civil No. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC., DEFENDANTS

COMPLAINT

I

The United States of America by Harold K. Wood, United States Attorney and Alan J. Swotes, Assistant United States Attorney, both in and for the Eastern District of Pennsylvania, acting under the direction of the Attorney General upon the request of the Secretary of Agriculture of the United States, brings this action under the provisions of Sec. 608a(6) of the Agricultural Marketing Agreement Act of 1937, as amended (50 Stat. 249, 7 U.S.C. 601 *et seq.*) (hereinafter referred to as the "Act") which vests the several district courts of the United States with jurisdiction specifically to enforce and to prevent and restrain violations of any order issued by the Secretary of Agriculture of the United States under the authority contained in the Act.

II

This action is brought to enforce the provisions of the order duly issued by the Secretary of Agriculture of the United States, under the authority contained in the Act, regulating the handling of milk in the New York-New Jersey milk marketing area, hereinafter referred to as Order No. 27, as amended (22 F.R. 4643). A true and correct copy of said Order No. 27, as amended, is attached hereto as Exhibit A and made a part of this complaint.

III

The defendant, Lehigh Valley Cooperative Farmers, is a corporation incorporated under the cooperative laws of Pennsylvania with its principal office and place of business at Allentown, Pennsylvania being within the Commonwealth of Pennsylvania and within the jurisdiction of this court. The officers of said corporation are as follows:

Glen A. Boger, President, Allentown, R.D. #2, Pennsylvania

Howard H. Lutz, Vice President, Kempton, Pennsylvania

IV

The defendant, Sunerest Farms, Inc., is a Pennsylvania corporation with its principal office and place of business at 1414 Millard Street, Bethlehem, Pennsylvania. The officers of said corporation are as follows:

Clifton E. Mowrer, President, 632 Edgeboro Blvd, Bethlehem, Pennsylvania

Rudolph P. Yokonic, Vice President, Magnolia Drive, Easton, Pennsylvania

V

Each of the defendants is a "handler" within the meaning of that term as defined in Sec. 927.7 of Order No. 27, as amended, in that each operates a milk plant approved by a duly constituted health authority as a source of milk for sale in the marketing area or in that a portion of all of the milk received at said plant is shipped to or received in the marketing area.

VI

The Market Administrator is the duly designated and acting agency of the Secretary of Agriculture authorized to administer the provisions of said Order No. 27, as amended, as provided in said Order No. 27 and in the Act.

VII

Section 927.50, and other sections of Order No. 27 require each handler subject to the order (including each of the defendants in this action) to file certain reports with the Market Administrator. Reports required under Sec. 927.50 are required to be filed with the Market Administrator, pursuant to the order, on or before the 10th day after the end of each month, in accordance with forms prescribed by the Market Administrator.

VIII

The defendants and each of them have failed and refused to file the reports required by Sec. 927.50, within the time required for such filing, and have not filed such reports to the date of this complaint although such reports have been requested of them by the Market Administrator.

IX

The effective operation of said Order No. 27, as amended, with respect to the handling activities of the defendants and each of them, has been impaired and defeated by the failure of the defendants to file the reports required by said Order No. 27 upon the basis of which obligations imposed by Order No. 27 must be ascertained by the Market Administrator and has made impossible the proper verification of such essential matters as the proper classification and payment for milk handled by the defendants including, but not limited to, the ascertainment of obligations which they may owe to their producers and to the producer-settlement and administrative assessment funds established under the order.

X

Under the provisions of Order No. 27, as amended, additional reports are due and additional obligations accrue each month to producers, the producer-settlement fund and

for administrative expenses. The obligations of these defendants vary each month, depending upon the percentage of utilization, of the milk received from producers, in the different classes established by the order. The obligations of the defendants under the order cannot be determined until the required reports are filed and the books and records of each are made available for the purpose of verifying the reported uses of milk received. The order provides an integrated plan for regulating the purchase or receipt of milk and its products for sale in the New York-New Jersey marketing area. Unless each step in said plan is strictly and promptly complied with, such failure disrupts the orderly handling of milk and its products in the marketing area.

WHEREFORE, Plaintiff prays:

1. That the Court issue a preliminary mandatory injunction requiring the defendants, their attorneys, agents, servants, employees, and all persons in active concert with them to comply forthwith with the provisions of Section 927.50 by filing forthwith appropriate reports with the Market Administrator in accordance with said provisions of said Order covering all monthly periods following August 1, 1957.

2. That the Court issue a preliminary mandatory injunction requiring the defendants, their attorneys, agents, servants, employees, and all persons in active concert with them to pay all sums found by the Market Administrator to be due and owing from each defendant to the Market Administrator and to producers in accordance with the provisions of said Order No. 27, as amended, following the filing of each such report, and appropriate verification thereof, by the Market Administrator.

3. That the Court issue a permanent mandatory injunction specifically enforcing against the defendants, their attorneys, agents, servants, employees, and all persons in active concert with them all provisions of said Order No.

27, as amended, and restraining them from violating the provisions of said Order.

4. That the Court retain jurisdiction in the premises until it has been completely assured that the defendants and each of them will fully comply with the provisions of said Order No. 27 and that the plaintiff be given all such other and different relief as to the Court may deem just and proper.

THE UNITED STATES OF AMERICA,
By HAROLD K. WOOD,
*United States Attorney for the*
*Eastern District of Pennsylvania.*

JOHN M. DURBIN,
*U. S. Department of Agriculture,*
*Washington 25, D. C.*

AFFIDAVIT

Filed 9/12/57

Civil Action No. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC., DEFENDANTS

STATE OF NEW YORK,
County of New York, ss:

AFFIDAVIT

Edward F. Nuclo, being duly sworn, deposes and says:

I am Assistant Market Administrator for Federal Order No. 27, as amended, being the order, as amended, regulating the handling of milk in the "New York-New Jersey milk marketing area," hereinafter called the marketing area. My office is at 205 E. 42nd Street, New York, New York. I make this affidavit in support of the application of the United States for a preliminary injunction directing the above-named defendants forthwith to file the reports required by said Order No. 27 and otherwise to comply fully with the provisions of said Order No. 27. I am informed that a copy of said Order No. 27 is being annexed to the complaint in this action, for convenient reference.

The order has been in effect in New York since September 1, 1938. Effective August 1, 1957, (22 F.R. 4643) Order No. 27 was greatly expanded in its coverage to include Northern New Jersey and portions of upstate New York within its defined marketing area, which previously had been limited to New York City and the adjacent counties of Westchester, Nassau and Suffolk. As a consequence a number of milk handlers, principally located in upstate New York, New Jersey and Pennsylvania were newly brought under regulation because of their association with and sales of milk in the newly added territory.

AFFIDAVIT

Section 927.7 of the revised order defines a regulated handler, in pertinent part, as follows:

> "Sec. 927.7. *Handler.* 'Handler' means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to or received in, the marketing area or (c). . . ."

Both of the defendants are "handlers" as so defined. I am informed and believe that each of them operates a milk plant which (a) is approved by marketing area health authorities as a source of milk for the marketing area and (b) from which milk and milk products, as stated in the definition, is shipped to or received in the marketing area and was so moved in August 1957. The plant of Lehigh Valley Cooperative Farmers is located at Allentown, Pennsylvania and the plant of Sunerest Farms, Inc. is located at Butztown, Pennsylvania.

On July 26, 1957, requests were sent to all known handlers, including the defendants, who would be newly regulated under the expanded order, for reports on July 1957 operations "for informational and statistical purposes only," as provided in Sec. 927.50 of the order. Both defendants failed and refused to file such reports for July.

On August 30, 1957 a further letter was sent to handlers newly regulated under the order, including both defendants, Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc. Said letter enclosed report forms for August 1957 operations, and requested the completion and filing thereof, as provided by the order. A copy of said letter is annexed hereto as Exhibit No. 1.

Both Lehigh Valley and Sunerest have filed petitions with the Secretary of Agriculture pursuant to § 608c(15) of the Agricultural Marketing Agreement Act in which they

assert that the amended order is unlawful. Such petitions, *inter alia*, state and admit that the petitioners' milk handling operations are such as to make defendants' milk subject either to full pricing and pooling under Order No. 27 or to the payments required by § 927.83 of Order No. 27 on Class I-A milk which enters the Order No. 27 marketing area. In such circumstances, their reports for August 1957 operations became due on September 10, 1957, under § 927.50 of Order No. 27. Both Lehigh Valley and Suncrest have failed and refused to file such reports, and are in violation of Order No. 27.

I am reliably informed and believe that such failure to report was and is deliberate. On or about August 21, 1957, one of the auditors on my staff called on Lehigh Valley to inquire why the informational report for July 1957 was not filed. This auditor reported that Mr. Glen A. Boger, President of Lehigh Valley, stated to him that no report would be filed under Order No. 27 unless compelled by court order. On August 22, 1957 Suncrest wrote the market administrator in response to a similar inquiry stating that Suncrest had not filed the requisite report, "on advice of counsel" (who also represent Lehigh Valley). A copy of such letter is attached hereto as Exhibit 2.

Although the report for July 1957 was only for informational purposes, the report for August 1957 is not so limited. Instead, it is essential for the calculation of obligations under Order No. 27 and for other purposes necessary to the operation of Order No. 27. In the absence of handler reports, and the data contained therein, the order cannot operate as provided by law nor can handler obligations thereunder be calculated.

I am further informed and believe that Lehigh Valley's intention not to comply with Order No. 27 has been widely publicized, as indicated by widespread reports throughout the industry of such intention. All indications are that the industry, especially handlers regulated for the first time beginning August 1, 1957, are watching with keen interest the outcome of Lehigh Valley's open flouting of Order No.

27. This office has heard reports from elements in the industry that Mr. Boger has stated that he expects enforcement action to be taken against Lehigh Valley "on the day after the report is due." It cannot be urged too strongly that immediate enforcement action is required to prevent serious and irreparable damage to this federal program and to the public interest. A failure to enforce Order No. 27 expeditiously as to these two handlers, who are openly defying the order, may result in a widespread wave of non-compliance by others who, for competitive and other reasons, may follow their lead.

EDWARD F. NUCLO.

Subscribed and sworn to before me this 12th day of September, 1957.

VINCENT J. P. MURPHY,
*Notary Public.*

Notary Public, State of New York.

No. 30-8075700.

Qualified in Nassau County.

Commission Expires March 30, 1958.

MARKET ADMINISTRATOR (EXHIBIT # 1)

MARKET ADMINISTRATOR

New York-New Jersey Milk Marketing Area
205 East 42nd Street, New York 17, New York
ORegon 9-1100

August 30, 1957.

TO HANDLERS:

Pursuant to the provisions of Federal Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey marketing area, you are required to report to this office with respect to the handling of milk and milk products received at your plant during the month of August 1957 and during each subsequent month.

The prescribed form for your use in reporting is enclosed in duplicate (a copy for your file). A copy of Order No. 27 and a copy of the accounting rules and regulations have also been supplied you. In the future you will be provided each month with the form on which you will be required to report for such month.

If there is no milk received at your plant direct from dairy farms, including your own farm, you are required to report on Form MA 1-B not later than the applicable date specified on that form. If milk *is* received at your plant direct from dairy farms, including your own farm, you are required to report either on Form MA 1-B or Form MA 1, depending upon whether or not your plant is a "pool plant." The provisions which specify the conditions under which a plant is a "pool plant" are given in Sec. 927.25 and Sec. 927.29 of Order No. 27.

The minimum class prices to be used in any computations you are required to make on your August report will be given in the official announcement of prices issued by this office not later than September 5, 1957, a copy of which will be sent you.

Your attention is specifically directed to the fact that you must report for August 1957 *not later than September*

*10, 1957* if your plant is either a pool plant or a plant at which there have been handled milk or milk products subject to payments under Sec. 927.83 and Sec. 927.84.

Very truly yours,

C. J. BLANFORD,
*Market Administrator.*

Enclosures

MARKET ADMINISTRATOR (EXHIBIT # 2)

(Here follows 1 Photolithograph)

177A

*Country Fresh Milk*
*Ice Cream*

PLANT: BOX 1 BUTZTOWN PENNSYLVANIA
EASTON ENT 1-0390

OFFICE: 1414 MILLARD STREET BETHLEHEM PA
BETHLEHEM UN 7-5814
UN 7-5471

Suncrest
FARMS INC.

August 22, 1957

New York-New Jersey
Milk Administrator
Federal Order #27

To Whom It May Concern:

We have not filled our report under this order on advice of counsel. Our lawyers are Caniels & Swope, Harrisburg, Penna.

SUNCREST FARMS, INC.

L. A. Ransel

L. A. Ransel
Controller

AFFIDAVIT

Civil Action No. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC., DEFENDANTS

UNITED STATES OF AMERICA,
District of Columbia, ss:

Herbert L. Forest, being duly sworn deposes and says:

I am now and have been since May 1954, Director of the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture. I was graduated from the University of Massachusetts and did graduate work in economics at Harvard University and, thereafter in 1934 was employed in the Market Administrator's Office (Federal Milk Order No. 4) in Boston, Massachusetts. In 1935 I joined the Director of the Dairy Section, United States Department of Agriculture and continued with that office continuously until I received the above-mentioned appointment. Except for a brief period during the war when I worked in the Secretary's office on requirements and allocations of food supplies and in the Office of the Marketing Services on overall prices and retaining problems.

Since 1934 I have been in intimate contact with the development and administration of Federal milk orders and have assumed increasing responsibility for their formulation and the supervision of their administration in all areas under regulation, inclusive of the New York-New Jersey Marketing Area.

Aside from the general policy objectives in the Act[1] which orders such as these are designed to achieve, the New York-New Jersey Order provides a method for regulating the exquisitely complicated milk business in a large

[1] 7 USC 601 *et seq.*

and heavily populated metropolitan area. The basic regulatory, statutory and constitutional principles and considerations underlying Order No. 27 are set forth and discussed by the Supreme Court in the *United States* vs. *Rock Royal Cooperative, et al.*, (307 US 533) and need not be repeated by me.

The operation of a Federal Milk Order, such as Order No. 27, as amended, involved in this proceeding and the effectuation of the policy of the Act necessitates prompt and full compliance by all handlers. Such compliance is particularly necessary in the case of an order providing for a market-wide pool as in Order No. 27, as amended. The pooling mechanization cannot operate as contemplated, nor can the full use value of all milk priced under the order be reflected in the blended price to producers computed each month unless all handlers file their reports at the times required and pay their minimum obligations as provided. Failure on the part of any handler to file the required reports and to pay his obligation within the time specified in the order, prevents the blended price computed for the delivery period involved from reflecting the full use value by an equivalent amount. If one handler or a small group of handlers is allowed to default, there is no reason why all other handlers should not be allowed to default and the utter breakdown of the order would eventually result.

These minimum essentials in the operation of fluid milk orders under which minimum prices are established were recognized and aptly stated by the Supreme Court in its opinion in the case of the *United States* vs. *Ruzicka* (329 US 287) as follows:

> "Promptness of compliance by those subject to the scheme is the presupposition of Order No. 41. Thus, definite monthly deadlines are fixed by the Order for every step in the program. In large measure, the success of this scheme revolves around a 'producers' fund which is solvent and to which all contribute in

accordance with a formula equitably determined and of uniform applicability. Failure by handlers to meet their obligations promptly would threaten the whole scheme. Even temporary defaults by some handlers may work unfairness to others, encourage wider noncompliance, and engender those subtle forces of doubt and distrust which so readily dislocate delicate economic arrangements."

Order No. 27, like Order No. 41, fixes "definite monthly deadlines" for every step in the program. Handlers' reports must be filed by the 10th day of the month following receipt of the milk. The Market Administrator, with such reports as a starting point, must compute the pool, announce the minimum blended price to be paid to producers, receive payment from handlers who owe the pool, and make payment to handlers who are entitled to draw out of the pool and all handlers must pay producers for the milk received by the 25th day of the month following its receipt from producers. Thus, the entire operation of each monthly pool must be completed within a space of 15 days. In order for all of the steps to be completed, time is necessarily of the essence.

Based upon my long and extensive experience with the formulation and administration of milk marketing orders under the Act, it is my considered opinion that unless the defendants herein are required to comply promptly with Order No. 27, noncompliance by other handlers may be expected to follow with consequent confusion and demoralization in the market and a possible resumption of the disorderly practices in the commerce of milk in the New York-New Jersey Marketing Area.

H. L. Forest.

Subscribed and sworn to before me this 11th day of September 1957.

My commission expires — 19 —.

Notary Public, District of Columbia.

ANSWER IN U.S. V. LEHIGH VALLEY—SUNCREST

CIVIL ACTION NO. 23268

UNITED STATES OF AMERICA

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

ANSWER

The defendant, Lehigh Valley Cooperative Farmers, and the defendant, Suncrest Farms, Inc., for their joint and several Answer to the Complaint filed herein say:

*First Defense*

I

The averments of Paragraph I of the Complaint are admitted.

II

The Second Paragraph of the Complaint is admitted in part and denied in part. It is admitted that the action is brought to enforce certain provisions of Federal Order No. 27, an Order issued by the United States Secretary of Agriculture. It is denied, however, that Section 927.3 of Order No. 27 was duly issued, but on the contrary it is averred that this Section, insofar as it includes Northern New Jersey in the marketing area outlined by Section 927.3, was issued without proper notice of a hearing and without giving all interested parties a fair opportunity to be heard on the proposal and is therefore illegal, unconstitutional and void. Such action was in violation of the provisions of the Marketing Agreement Act of 1937 as amended, the Administrative Procedure Act and the Rules and Regulations established under both Statutes, and in violation of the Fifth Amendment of the Constitution of the United States. It is further denied that Sections 927.83 and 927.84 were duly issued or issued under authority contained in the Marketing Agreement Act of 1937, as amended. It is averred that these two Sections are in direct violation of the provisions of the Marketing Agree-

ment Act relating to uniformity of costs to handlers, and were promulgated without any substantive testimony being placed in the record in support of them. When such provisions were before the Courts they have been declared to be invalid as violating the Marketing Agreement Act. Such Sections are therefore illegal, void, being in violation of the Fifth Amendment of the United States Constitution and in violation of the Marketing Agreement Act of 1937.

III

The averments of Paragraph III of the Complaint are admitted.

IV

The averments of Paragraph IV of the Complaint are admitted, except that the Vice President of Suncrest Farms, Inc., is Rudolph P. Yohonic.

V

The averments of Paragraph V of the Complaint are admitted.

VI

The averments of Paragraph VI of the Complaint are admitted.

VII

The averments of Paragraph VII of the Complaint are denied insofar as the defendants in this action are concerned. The defendants deny that Section 927.50 of Order No. 27 require them to file any reports whatsoever for two reasons:

1. The defendants are not pool plants as they have made no application under Section 927.25 to be so designated.

2. For the reasons hereinbefore specifically set forth and hereinafter specifically set forth the defendants are not subject to Sections 927.83 and 927.84 as both Sections were issued in an unlawful and unauthorized manner and are illegal and void. Section 927.50 requires reports from only pool plants or handlers subject to 927.83 and 927.84.

The omnibus language "other sections" of Paragraph VII of the Complaint make it impossible to specifically answer in that the defendants do not know what Sections the plaintiff is referring to or under what theory. It is denied, however, for the reasons herein more specifically set forth that the defendants are required to file any reports whatsoever. The reports requested of the defendants, the failure to file which is the basis of this Complaint, seem to rest on Section 927.50.

VIII

The averments of Paragraph VIII of the Complaint are admitted.

IX

Each and every averment in Paragraph IX of the Complaint are specifically denied for the following reasons:

1. Section 927.25 would require these defendants to make application if they desire to be pool plants. The Administrator then would determine if they could be so designated. Such application has not been made.

2. Sections 927.83 and 927.84, for the reasons heretofore and hereinafter specifically set forth, are illegal and void. It is therefore denied that Order No. 27 subjects the defendants to its operation. The Market Administrator under the terms of Order No. 27 has no authority to classify the defendants' milk or to establish an obligation of the defendants to their producers or to any other funds or persons, including the Producer Settlement and Administrative Assessment Funds. The defendants not being pool plants do not have their producer obligations established by Order No. 27, nor does Order No. 27 place upon them any obligation for administrative assessments. Sections 927.83 and 927.84 attempt in an illegal and void manner to merely make the defendants responsible to the Producer Settlement Fund for sums of money which are divided among the producers shipping to pool plants. Tnis obligation has nothing to do whatsoever with determining the percentage of milk sold in the various classifications, and nothing to do with arriving at the blend price which

the producers shipping to pool plants are entitled to. The sums of money paid to the Producer Settlement Fund under Sections 927.83 and 927.84 are divided by the total amount of milk passing through pool plants and added to the blend price.

X

Each and every averment in Paragraph X of the Complaint is specifically denied. For the reasons heretofore set forth it is denied that any reports whatsoever are due from these defendants. It is denied that additional obligations accrue each month to producers insofar as these defendants are concerned, under Order No. 27. It is denied that these defendants have any obligation under Order No. 27 for administrative expenses. Order No. 27 does not pretend to create any of these obligations just denied. It is denied that the defendants owe the Producers Settlement Fund any monies whatsoever for the specific reasons set forth in this Answer concerning Sections 927.83 and 927.84. It is denied that these defendants' obligations vary each month depending upon percentage of utilization of milk received from producers in different classes for the reason that percentages of utilization and different classes apply to pool plants. Order No. 27 does not pretend to place any financial obligation or any obligations whatsoever on the defendants except if they are subject to 927.83 and 927.84, and therefore it is denied that the Administrator has the authority to make any determinations whatsoever. It is denied that Order No. 27 provides an integrated plan for regulating the purchase or receipts of milk and its products in the New York-New Jersey Marketing Area insofar as these defendants are concerned, as the defendants are not pool plants and are subject to the Order only if Sections 927.83 and 927.84 are valid. It is denied that the failure to file reports or to pay monies into the Producer Settlement Fund by these defendants disrupts the orderly handling of milk and its products in the marketing area. The Administrator arrives at a blend price to be

paid to all producers shipping to pool plants. This is done by taking all of the pool plant sales and working those sales against all of the milk received from producers at pool plants. The percentage of milk sold in Classes 1A, 1B, 2, 3 and 4, etc., is then determined. These percentages are worked against the class prices and the blend price is then determined and announced. This blend price is what the producer is entitled to, subject to freight and location differentials and other authorized deductions. The Administrator's next step is to take the amount of monies paid into the Producer Settlement Fund by virtue of Sections 927.83 and 927.84 by non-pool plants and divide this sum of money by the total amount of milk shipped by producers to pool plants and add this quotient to the blend prices. The milk received by these defendants and sold in the area in no way aids, interferes with, or is used in determining the percentage figures or the blend price just above referred to. It is merely a gratuity added to the price. A delay in the payment of these monies until such time as the validity of the Sections 927.83 and 927.84 are determined in no wise disrupts or interferes with the orderly handling of milk in the milk marketing area.

*Second Defense*

XI

Compliance by the defendants with the provisions of Order No. 27 under attack would work irreparable injury and harm to each of them. Conversely, non-compliance by these defendants would work hardship on no one. Should the very substantial legal questions raised by defendants in their Appeals be ultimately decided against them, the monies required of them would be paid to and distributed by the Market Administrator at that time, and neither the Order No. 27 producers, nor the Federal Government, nor the public would be inconvenienced. The cost to defendants of compliance would be about $2.50 per cwt.; this money distributed to the other Order No. 27 producers would be about one-fourth to one-third of a cent per cwt.

*Third Defense*

XII

There is pending at this time before the Secretary of Agriculture of the United States, appeals by these defendants in which the validity of Sections 927.3 and 927.83 and 927.84 is at issue. The said appeals were lodged with the Secretary under date of August 1, 1957, the very date Order No. 27 became effective. Defendants have exercised their statutory rights of appeal with utmost diligence and expedition.

WHEREFORE, defendants pray:

1. That the rule dated the 13th day of September, 1957, to show cause why a preliminary injunction should not be granted, be discharged.
2. That the Complaint be dismissed, or
3. That the proceedings be stayed until such time as there is a final determination by the Secretary of Agriculture on a petition filed by these defendants and now pending before the Secretary of Agriculture under Section 8c(15)(A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A. 608c(15)(A), and any appeals taken therefrom by the parties under Section 8c(15)(B) of the Agricultural Marketing Agreement Act, 7 U.S.C.A. 608c(15)(B), to this Court.

DANIELS AND SWOPE,
By WILLIS F. DANIELS,
*Commerce Building,*
*Harrisburg, Pennsylvania.*

JOSEPH GRANT MCCABE, 3rd, Esq.,
*Land Title Building,*
*Philadelphia, Pennsylvania.*

*Attorneys for*
*Lehigh Valley Cooperative Farmers,*
*Suncrest Farms, Inc.*

ORDER TO SHOW CAUSE

CIVIL ACTION NO. 23268

UNITED STATES OF AMERICA

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

ORDER

AND NOW, to wit, this 13th day of September, 1957, upon motion of the United States Attorney, and upon consideration of the attached affidavits, a Rule is granted upon the defendants herein to Show Cause why the Preliminary Injunction prayed for in the Complaint should not be granted. Said Rule is returnable on the 20th day of September, 1957, at 10:30 a.m. o'clock in Court Room 6, United States Court House, 9th & Market Streets, Philadelphia, Pennsylvania.

THOMAS J. CLAY,

*J.*

TEMPORARY INJUNCTION

Filed October 4, 1957

CIVIL ACTION No. 23268

UNITED STATES OF AMERICA

*vs.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

TEMPORARY INJUNCTION

This action, brought under the provisions of Sec. 608a(6) of the Agricultural Marketing Agreement Act of 1937, as amended, (50 Stat. 249, 7 U.S.C. 601 *et seq.*), coming on for hearing before the Court upon a rule to show cause why a temporary injunction should not be granted; the defendants having filed their respective motions for a stay of proceedings pending determination of the issues before the Secretary of Agriculture in an administrative proceeding; the parties having presented evidence; counsel having been heard and briefs submitted in support of their respective positions; and the Court being fully advised makes the following

FINDINGS OF FACT

1. The defendant, Lehigh Valley Cooperative Farmers, is a corporation, incorporated under the cooperative laws of Pennsylvania, with its principal office and place of business at Allentown, Pennsylvania, being within the Commonwealth of Pennsylvania and within the jurisdiction of this Court.

2. The defendant, Suncrest Farms, Inc., is a Pennsylvania corporation with its principal office and place of business at 1414 Millard Street, Bethlehem, Pennsylvania.

3. Each of the defendants admitted that it is a "handler" within the meaning of that term as defined in Sec. 927.7 of Order No. 27, as amended.

4. The Market Administrator is the duly designated and acting agency of the Secretary of Agriculture authorized to administer the provisions of said Order No. 27, as amended, as provided in said Order No. 27 and in the Act.

5. Each of the defendants has admitted that it has not filed the monthly reports with the Market Administrator of Order No. 27, as amended, as required by the provisions of said Order.

6. Each of the defendants has admitted that it has not paid for the month of August 1957, to the Market Administrator of Order No. 27, as amended, any of the amounts alleged by the plaintiff to be due and payable, but has asserted in good faith that such Order is invalid and has promptly taken its administrative appeal. As part of the defendants' motions for a stay of proceedings each asserts, and in the opinion of the Court validly asserts, that substantial legal difficulties will be encountered by them if payments are now ordered to be made directly to the Secretary of Agriculture and are later found to be not in accordance with law and refundable to the defendants.

7. Each of the defendants has failed and refused, and still continues to refuse, to comply with the provisions of said Order by filing the required reports and making available to the Market Administrator the accounts and records of its operations, and to permit verification of such reports, and each has refused, and continues to refuse, to make payments to the Producer-Settlement Fund and the Administrative Fund as required by said Order No. 27.

## Conclusions of Law

The jurisdiction conferred upon this Court by Sec. 608a(6) of the Act (7 U.S.C. 608a(6)) is to enforce and to prevent and restrain any person from violating any order issued pursuant to the Act. The Act authorizes a handler to challenge before the Secretary of Agriculture his order or any obligation imposed in connection therewith as not

in accordance with law and to ask to have it modified or to be exempted therefrom.

When the order is so challenged, the determination of the Secretary of Agriculture is final, if in accordance with law (7 U.S.C. 608c(15)(A)). To test whether such ruling is in accordance with law, a handler may appeal to the appropriate District Court (7 U.S.C. 608c(15)(B)). But Section (15) further gives the handler access to the Secretary of Agriculture for administrative relief and opportunity for judicial review of his determination and further provides that the pendency of the proceedings before the Secretary "shall not impede, hinder or delay the United States or the Secretary of Agriculture from obtaining relief" under Sec. 608a(6).

The plaintiff relies upon the cases of *United States* v. *Ruzicka, et al.*, 329 U.S. 287, 91 L. Ed. 290 (1946); *Chapman* v. *United States*, 139 F.2d 327 (C.A.8, 1943); *La Verne Co-op. Citrus Ass'n.* v. *United States*, 143 F.2d 415 (C.A. 9, 1944); *United States* v. *Turner Dairy Co.*, 162 F.2d 425 (C.A.7, 1947); *Panno* v. *United States*, 203 F.2d 504 (C.A.9, 1953), and *Hobby* v. *Hodges*, 215 F.2d 754 (C.A.10, 1954).

The plaintiff also asserts that while the action is equitable in nature and it is within the discretion of the Court whether relief shall be granted, it was the intention of Congress that the order should be effective in all respects, both as to the making of the reports as well as making payments to the Settlement Fund thereunder during the pendency of administrative procedures before the Secretary of Agriculture. The Court so reads the Act. The defendants, however, in support of their respective motions for stay contend that irreparable harm may come to them if they are in the first instance ordered to make payments into the Settlement Fund and it is thereafter determined that they were not required under law to make such payments and the money is ordered refunded to them inasmuch as payments may be made to participants in the "pool" who later leave the pool thus affording no opportunity for an offset of the amounts previously paid.

The same argument was advanced to the Court of Appeals for the First Circuit in the case of *H. P. Hood and Sons* v. *United States*, 97 F.2d, 677 (1st Cir. 1938), and in a per curiam opinion that court held that there was nothing in the act which prevented the court from granting a stay of proceedings.

A review by this Court of the legislative history of the Act also indicates that in approving the legislation, the Congress contemplated that in appropriate cases a stay might be granted in a proceeding brought under the act in a district court. This action is in equity. The Court does not feel that any irreparable harm will be occasioned to either of the defendants if they are required to file the reports provided for in Marketing Order No. 27. On the other hand, it is of the opinion that equity does not require that the payments shown to be due under the Order be made directly into the Settlement Fund but that the interests of both parties can be protected by ordering such payments to be made into the Registry of the Court pending the determination of the administrative proceedings before the Secretary of Agriculture and/or a judicial review of such determinations in this Court. The Court, therefore, on this 4th day of October, 1957, makes the following

ORDER—Filed October 4, 1957

1. It is ORDERED, ADJUDGED AND DECREED that each of the defendants file with C. J. Blandford, the Market Administrator, within 15 days from the date of this Order, all reports required by the provisions of Order No. 27, as amended, effective August 1, 1957, beginning with the reports for the period August 1957.

2. That the defendants forthwith make available to C. J. Blandford, the Market Administrator, or his representative, all books, memoranda, account records and factors for the verification of their said required reports.

3. That the defendants within 15 days from the date of this Order pay into the Registry of this Court the amounts

shown on their said reports to be due and payable under said order and to make regular monthly payments thereafter into the said Registry of the Court of the amounts shown to be due on the reports as filed in any particular month, on or before the dates such payments would ordinarily be made to the Market Administrator under the terms of said order; such payments to be held in the Registry of this Court pending determination of the proceedings before the Secretary of Agriculture and/or a judicial review of such determination as made in said administrative proceedings and until further order of this Court.

4. That the defendants forthwith and any of the following persons acting in their behalf, to wit: agents, attorneys, servants, employees, successors, or assigns, and all persons in active concert with them be and they are hereby temporarily enjoined from doing any act or acts in violation of the requirements of paragraphs 1 and 2 of this Order.

5. That the defendants enter their joint bond in the sum of $5,000.00 within 15 days from the date of this Order conditioned upon their compliance with the terms of this Order.

6. That the Court retain such jurisdiction of this action as may be necessary for the entering of such further orders and judgments as may be necessary to give full and equitable relief to both parties. Leave is granted all parties on 48 hours' notice to move this Court to set aside, vacate, alter or amend any or all of the terms of this Order.

BY THE COURT:
THOMAS J. CLARY
*J.*

MOTION TO AMEND TEMPORARY INJUNCTION

CIVIL ACTION NO. 23268

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC., DEFENDANTS

MOTION TO AMEND TEMPORARY INJUNCTION

Comes now the plaintiff and moves the Court:

1. That paragraph 3 of the temporary injunction entered herein on or about October 4, 1957, be modified to provide:

(a) That all monies paid into the registry of this court for milk delivered from August 1, 1957 to September 1, 1958, continue to be held in the registry of this court pending judicial review of the action of the Secretary of Agriculture pending in this court and until further orders of this court;

(b) That all monies paid into the registry of this court for milk delivered on and after September 1, 1958 be paid to the Market Administrator for Order No. 27, as amended, for deposit in the producer-settlement fund for distribution in accordance with the provisions of Order No. 27, as amended; and

(c) That the defendants thereafter make regular monthly payments of the amounts shown to be due in accordance with the terms and provisions of said order, as amended, to the Market Administrator for Order No. 27, as amended, for deposit in the producer-settlement fund for distribution in accordance with the terms and provisions of said order, as amended.

The foregoing motion is based upon the following reasons:

1. At the time the enforcement action herein (C.A. 23268) was filed, Order No. 27 (§ 927.83) required all handlers who operated non-pool plants from which Class

I-A or Class II milk was disposed of in the marketing area to make payments at a prescribed rate per hundredweight on milk so disposed of in the New York-New Jersey marketing area. In lieu of making this payment, such a handler had the option of having its plant be a pool plant and of being fully pooled by the New York-New Jersey order, provided the total Class I disposition from such plant was up to a specified percentage of its total receipts from dairy farmers, and provided there was not disposed of from such plant a greater percentage of its receipts from dairy farmers as Class I milk in some other federally regulated marketing area than was disposed of as Class I-A in the New York-New Jersey marketing area (§ 927.29(d)).

2. Both defendants disposed of a sufficiently high percentage of receipts from dairy farmers in Classes I-A and I-B to be eligible to elect pool status as an alternative to making payments under § 927.83.

3. Defendant Lehigh Valley changed its methods of marketing milk to Philadelphia buyers concurrently with the extension of the New York-New Jersey order so that it allegedly disposed of a greater percentage of its receipts as Class I milk in the Philadelphia marketing area than in the New York-New Jersey marketing area, and contended that it was therefore not eligible to exercise the option of being fully regulated by Order No. 27. This change in its method of marketing milk also brought Lehigh under the Philadelphia Order as a regulated handler for the first time. However, the Philadelphia order provided that the minimum obligation for milk imposed by that order would be reduced by the amount required to be paid under the New York-New Jersey order so that the sum of the two obligations did not exceed that of any other handler regulated by the Philadelphia order for milk of the same quality and used in the same way.

4. Defendant Suncrest did not dispose of any Class I milk in such a way as to become subject to the Philadelphia order and although eligible, did not exercise its option to

have its plant be a pool plant and to be fully regulated by the New York-New Jersey order.

5. The New York-New Jersey market administrator billed both defendants for Class I-A milk disposed of in the New York-New Jersey marketing area.

6. Both handlers refused to pay said billings until they were commanded by this court to make the payments specified by Order No. 27.

7. On August 1, 1957, the day the amendment to Order No. 27 became effective, the defendants herein each filed its separate petition before the Secretary of Agriculture pursuant to its statutory administrative remedy under § 8c(15)(A) of the act (7 U.S.C. 608c(15)(A)) contesting the validity of § 927.3 and § 927.83 of the order as it was then in effect.

8. Effective September 1, 1958 the New York-New Jersey order was amended (23 F.R. 6736) to fully regulate all handlers who had the required proportion of total receipts from dairy farmers in Class I and who disposed of any Class I-A milk in the New York-New Jersey marketing area, regardless of the proportion of Class I disposition in any other federally regulated area (§ 927.29(d)). The Philadelphia order, since a date prior to the facts involved in this case, has provided for exemption from that order of any plant fully regulated under another Federal order. The September 1, 1958 amendment gave handlers in the position of Lehigh and Sunecrest the option of electing to have their plants be non-pool plants and to make payments *under* § 927.83 in lieu of being fully regulated.

9. Each of the defendants herein, on its report to the market administrator for the month of September 1958, elected (a) not to have its plant designated as a pool plant fully subject to the pricing and pooling provisions of the New York-New Jersey order and (b) to make the payments into the producer-settlement fund at the rate specified in § 927.83(b) as shown by photostat copies of such report attached hereto and made a part hereof as Exhibits "A"

and "B" respectively. Each monthly report filed by each of the defendants thereafter has contained such an election.

10. Inasmuch as:

(a) the status under the order of all persons operating as do the defendants Lehigh and Sunerest was changed in September 1958 by reason of an amendment duly issued after notice and hearing, the validity of which amendment is not an issue in this case;

(b) the obligation mandatorily imposed on these defendants prior to that date, which obligation and order provision are now under review on their merits pursuant to 7 U.S.C. 608c(15)(B), has not been mandatorily imposed since September 1, 1958;

(c) all sums paid by these defendants under Order No. 27 by reason of their operations since September 1, 1958 have been determined pursuant to the voluntary and repeated election of each of the defendants under an option provided in the said amendment effective September 1, 1958; and

(d) the validity of the above cited amendment is not involved in the review proceedings now on appeal and no new issue can be injected in such review proceedings, the monies paid into the registry of the court for milk delivered on and after September 1, 1958 should be released and paid to the market administrator for and on behalf of the producer-settlement fund and the defendants should be required to make regular monthly payments of the amounts shown to be due in accordance with the terms and provisions of said order, as amended, to the market administrator for and on behalf of the producer-settlement fund.

HAROLD K. WOOD,
*United States Attorney.*
BY MICHAEL L. TEMIN,
*Assistant United States Attorney.*

JOHN M. DURBIN,
*Attorney, Office of the General Counsel,*
*U. S. Department of Agriculture,*
*Washington 25, D.C.*

MOTIONS FOR SUMMARY JUDGMENT AND CONSOLIDATION OF ACTIONS

Civil Action No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

MOTIONS FOR SUMMARY JUDGMENT AND CONSOLIDATION OF ACTIONS

AND NOW, this 25th day of August, 1959, comes Lehigh Valley Cooperative Farmers, Plaintiff, and by its attorneys, Daniels and Swope, and Weston C. Overholt, Jr., moves the Court for Summary Judgment for the reasons extensively and particularly set forth in the Bill of Complaint heretofore filed in this action, pursuant to subsection 15-B of 8c of the Agricultural Adjustment Act of 1933, as amended, and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.). This Bill of Complaint is in the nature of an appeal from the administrative ruling of the Department of Agriculture through its Judicial Officer.

The Bill of Complaint questions the validity of Order No. 27, insofar as it regulates milk sold in Northern New Jersey, and particularly questions the validity of Section 927.83 of Order No. 27, as amended.

The Plaintiff, through Counsel, FURTHER MOVES that this case be consolidated with the case of Sunerest Farms, Inc., Plaintiff, vs. Ezra Taft Benson, Secretary of Agriculture of the United States of America, Defendant, Civil Action No. 26109, and that both these cases be consolidated with the case of the United States of America vs. Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., Civil Action No. 23268, for the following reasons:

(1) In the case of Civil Action No. 23268, the United States Government moved against Lehigh Valley Co-

operative Farmers and Sunerest Farms, Inc. for a mandatory injunction compelling the Defendants to comply with the provisions of Order No. 27, as amended. The Court, after hearing argument, made its Order requiring the Defendants to file reports with, and permit its books to be examined and audited by, the Administrator of Order No. 27, and further ordered that all monies shown to be due be paid into the Registry of the Court.

(2) The United States Government notified Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., that as of August 24, 1959, it would file a motion asking that the Court's Order be modified in such a manner as to have all payments which have been made to the Registry of the Court since September 1, 1958, paid over to the Administrator of Federal Order No. 27.

(3) Order No. 27 first became effective as to Northern New Jersey August 1, 1957, and as of September 1, 1958 a ministerial change was made upon which the Government's present motion is based. The Order, so far as this issue is concerned, was not changed in any substantive or fundamental manner whatsoever. The rights and the obligations under Order No. 27 of Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., remain the same now as they were on August 1, 1957.

(4) The basic and fundamental legal question involved is the validity of Section 927.83. The Court previously ruled that until this question was disposed of, through a 15-A and a 15-B proceeding, the monies shown to be due on reports should be paid into the Registry of the Court. The question as to the validity of Section 927.83 is now in proper posture for trial, argument and decision in this Court.

(5) The Government, in its Answer (paragraph 7)

to the aforementioned Bill of Complaint, requested that the matters be consolidated.

(6) The Sunerest Farms, Inc. case, Civil Action No. 26109, and the Lehigh Valley Cooperative Farmers case, Civil Action No. 26048, should be consolidated for the reason that the questions are essentially and basically the same.

Respectfully submitted,

DANIELS and SWOPE.
By WILLIS F. DANIELS,
*Commerce Building,*
*Harrisburg, Pennsylvania.*

WESTON C. OVERHOLT, JR.,
*1018 Western Saving Fund Bldg.,*
*S.E. Corner Broad & Chestnut St.,*
*Philadelphia 7, Pennsylvania,*

*Attorneys for Plaintiff.*

Dated: August 25, 1959.

MOTIONS FOR SUMMARY JUDGMENT AND CONSOLIDATION OF ACTIONS

Civil Action No. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

MOTIONS FOR SUMMARY JUDGMENT AND CONSOLIDATION OF ACTIONS

AND NOW, this 25th day of August, 1959, comes Suncrest Farms, Inc., Plaintiff, and by its attorneys, Daniels and Swope, and Weston C. Overholt, Jr., moves the Court for Summary Judgment for the reasons extensively and particularly set forth in the Bill of Complaint heretofore filed in this action, pursuant to subsection 15-B of 8c of the Agricultural Adjustment Act of 1933, as amended, and reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 et seq.). This Bill of Complaint is in the nature of an appeal from the administrative ruling of the Department of Agriculture through its Judicial Officer.

The Bill of Complaint questions the validity of Order No. 27, insofar as it regulates milk sold in Northern New Jersey, and particularly questions the validity of Section 927.83 of Order No. 27, as amended.

The Plaintiff, through Counsel, FURTHER MOVES that this case be consolidated with the case of Lehigh Valley Cooperative Farmers, Plaintiff, vs. Ezra Taft Benson, Secretary of Agriculture of the United States of America, Defendant, Civil Action No. 26048, and that both these cases be consolidated with the case of the United States of America vs. Lehigh Valley Cooperative Farmers and Suncrest Farms, Inc., Civil Action No. 23268, for the following reasons:

(1) In the case of Civil Action No. 23268, the United States Government moved against Lehigh Valley Co-

operative Farmers and Sunerest Farms, Inc. for a mandatory injunction compelling the Defendants to comply with the provisions of Order No. 27, as amended. The Court, after hearing argument, made its Order requiring the Defendants to file reports with, and permit its books to be examined and audited by, the Administrator of Order No. 27, and further ordered that all monies shown to be due be paid into the Registry of the Court.

(2) The United States Government notified Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., that as of August 24, 1959, it would file a motion asking that the Court's Order be modified in such a manner as to have all payments which have been made to the Registry of the Court since September 1, 1958, paid over to the Administrator of Federal Order No. 27.

(3) Order No. 27 first became effective as to Northern New Jersey August 1, 1957, and as of September 1, 1958, a ministerial change was made upon which the Government's present motion is based. The Order, so far as this issue is concerned, was not changed in any substantive or fundamental manner whatsoever. The rights and the obligations under Order No. 27 of Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., remain the same now as they were on August 1, 1957.

(4) The basic and fundamental legal question involved is the validity of Section 927.83. The Court previously ruled that until this question was disposed of, through a 15-A and a 15-B proceeding, the monies shown to be due on reports should be paid into the Registry of the Court. The question as to the validity of Section 927.83 is now in proper posture for trial, argument and decision in this Court.

(5) The Government, in its Answer (paragraph 7) to the aforementioned Bill of Complaint, requested that the matters be consolidated.

(6) The Lehigh Valley Cooperative Farmers case, Civil Action No. 26048, and the Suncrest Farms, Inc. case, Civil Action No. 26109, should be consolidated for the reason that the questions are essentially and basically the same.

Respectfully submitted,

DANIELS and SWOPE,
By WILLIS F. DANIELS,
*Commerce Building,*
*Harrisburg, Pennsylvania*

WESTON C. OVERHOLT, JR.,
*1018 Western Saving Fund Bldg.,*
*S.E. Corner Broad & Chestnut St.,*
*Philadelphia 7, Pennsylvania,*
*Attorneys for Plaintiff.*

Dated: August 25, 1959.

CROSS MOTION FOR SUMMARY JUDGMENT

CIVIL ACTION NO. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

CROSS MOTION FOR SUMMARY JUDGMENT

Now comes Ezra Taft Benson, Secretary of Agriculture of the United States of America by Harold K. Wood, United States Attorney in and for the Eastern District of Pennsylvania by Assistant United States Attorney, and, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, moves the Court to enter summary judgment for the defendant, Ezra Taft Benson, Secretary of Agriculture, in this action affirming the ruling of the Judicial Officer.

There will be filed in the office of the clerk of this court a certified transcript of the proceedings had in the Department of Agriculture in connection with the petition of plaintiff under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), this being the record upon which the ruling of the Judicial Officer was based. The sole function of the Court in this statutory appeal under § 8c(15)(B) of the act (7 U.S.C. 608c(15)(B)) is to review the administrative proceeding before the Secretary of Agriculture to determine whether he "acted in accordance with law." There can, therefore, be no genuine issue of a material fact.

Therefore, the defendant demands:

(1) That the defendant, Ezra Taft Benson, Secretary of Agriculture, be given a summary judgment herein affirming the ruling of the Judicial Officer as being "in accordance with law;"

(2) that the defendant be given his costs herein, the same to be taxed by the clerk of the court; and

(3) that the defendant be given all such other, further and different relief as to the Court may seem just and proper.

HAROLD K. WOOD,
*United States Attorney.*

MICHAEL L. TEMIN,
*Assistant United States Attorney.*

JOHN M. DURBIN,
*Attorney, Office of the General Counsel,*
*U. S. Department of Agriculture,*
*Rm. 1325, South Building,*
*Washington, D. C.*

CROSS MOTION FOR SUMMARY JUDGMENT

CIVIL ACTION No. 26109

SUNCREST FARMS, INC., PLAINTIFF

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

CROSS MOTION FOR SUMMARY JUDGMENT

Now comes Ezra Taft Benson, Secretary of Agriculture of the United States of America by Harold K. Wood, United States Attorney in and for the Eastern District of Pennsylvania by Assistant United States Attorney, and, in accordance with the provisions of Rule 56 of the Rules of Civil Procedure for the District Courts of the United States, moves the Court to enter summary judgment for the defendant, Ezra Taft Benson, Secretary of Agriculture, in this action affirming the ruling of the Judicial Officer.

There will be filed in the office of the clerk of this court a certified transcript of the proceedings had in the Department of Agriculture in connection with the petition of plaintiff under § 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 *et seq.*), this being the record upon which the ruling of the Judicial Officer was based. The sole function of the Court in this statutory appeal under § 8c(15)(B) of the act (7 U.S.C. 608c(15)(B)) is to review the administrative proceeding before the Secretary of Agriculture to determine whether he "acted in accordance with law." There can, therefore, be no genuine issue of a material fact.

Therefore, the defendant demands:

(1) That the defendant, Ezra Taft Benson, Secretary of Agriculture, be given a summary judgment herein affirming the ruling of the Judicial Officer as being "in accordance with law;"

(2) that the defendant be given his costs herein, the same to be taxed by the clerk of the court; and

(3) that the defendant be given all such other, further and different relief as to the Court may seem just and proper.

HAROLD K. WOOD,
*United States Attorney.*
MICHAEL L. TEMIN,
*Assistant United States Attorney.*

JOHN M. DURBIN,
*Attorney, Office of the General Counsel,*
*U. S. Department of Agriculture,*
*Rm. 1325, South Building,*
*Washington, D. C.*

DEFENDANT'S OPPOSITION TO CONSOLIDATION OF ACTIONS

CIVIL ACTION NO. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

DEFENDANT'S OPPOSITION TO CONSOLIDATION OF ACTIONS

The defendant, through his counsel, opposes the consolidation of this action with the action of *Suncrest Farms Inc.* v. *Benson*, Secretary of Agriculture of the United States of America, Civil Action No. 26109, for the following reasons: These actions involve different parties plaintiff and different issues of law and fact, the only issues in common being the validity of the extension of the marketing area to include the 13 northern counties in the State of New Jersey by amendment to Order No. 27.

The defendant does not desire to cause the Court or the parties additional work by opposing their consolidation. However, the same result can be obtained by submitting a single brief in both actions specifying the particular action to which given portions of the brief apply and by arguing the cases at the same time without an actual order of consolidation.

The defendant has no objection to the action of the *United States of America* v. *Lehigh Valley Cooperative Farmers and Suncrest Farms Inc.*, Civil Action No. 23268, being consolidated with this action by way of counterclaim provided all of his rights under the present action be maintained.

HAROLD K. WOOD,
*United States Attorney.*

MICHAEL L. TEMIN,
*Assistant United States Attorney.*

JOHN M. DURBIN,
*Attorney, Office of the General Counsel,*
*U. S. Department of Agriculture,*
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DEFENDANT'S OPPOSITION TO CONSOLIDATION OF ACTIONS

CIVIL ACTION NO. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

DEFENDANT'S OPPOSITION TO CONSOLIDATION OF ACTIONS

The defendant, through his counsel, opposes the consolidation of this action with the action of *Lehigh Valley Cooperative Farmers* v. *Benson*, Secretary of Agriculture of the United States of America, Civil Action No. 26048, for the following reasons: These actions involve different parties plaintiff and different issues of law and fact, the only issues in common being the validity of the extension of the marketing area to include the 13 northern counties in the State of New Jersey by amendment to Order No. 27.

The defendant does not desire to cause the Court or the parties additional work by opposing their consolidation. However, the same result can be obtained by submitting a single brief in both actions specifying the particular action to which given portions of the brief apply and by arguing the cases at the same time without an actual order of consolidation.

The defendant has no objection to the action of the *United States of America* v. *Lehigh Valley Cooperative Farmers and Suncrest Farms, Inc.*, Civil Action No. 23268, being consolidated with this action by way of counterclaim provided all of his rights under the present action be maintained.

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OPINION

CIVIL ACTION No. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS AND SUNCREST FARMS, INC., DEFENDANTS

CIVIL ACTION No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, INC., PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

CIVIL ACTION No. 26109

SUNCREST FARMS, PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

Filed April 25, 1960

OPINION

April 25, 1960

CLARY, J.,

This action arises under the Agriculture Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937 (hereinafter referred to as the "Act"), 7 U.S.C.A. §601 et seq. Section 608c(15)(B) of that Act authorizes a district court's review of the rulings of the judicial officer of the United States Department of Agriculture, who acts pursuant to authority delegated to him by the Secretary of Agriculture The particular questions which Lehigh Valley Cooperative Farmers and Suncrest

Farms, Inc.[1] raised in this review proceeding deal with one of the numerous amendments to *Order No. 27* by the Secretary (7 C.F.R. § 927) which originally regulated the handling of milk in the metropolitan New York milk marketing area. The ruling under attack upheld the validity of one of these amendments to Order No. 27, which amendment extended the marketing area defined in that Order to all or part of thirteen counties in northern New Jersey, effective August 1, 1957. Both of the plaintiffs, who distribute milk in this new area, strongly object to certain provisions in amended Order No. 27.

Prior to the present action and shortly after newly amended Order No. 27 became effective, the government brought suit in this Court under § 608(a)(6) of the Act to enforce, by injunctive order, the terms of the amended Order against the present plaintiffs. *United States* v. *Lehigh Valley Cooperative Farmers*, 161 F. Supp. 885 (E.D. Pa. 1957). On motion by the defendants in that action (the plaintiffs here), this Court ruled that although it was the intention of Congress that reports as well as payments to the Producer Settlement Fund called for by Order No. 27 should be made during *pendency* of administrative review before the Secretary of Agriculture, where irreparable harm could come to the defendants by ordering them to pay into this fund because payments might be made to participants in the fund "pool" who later leave the pool, the defendants would be ordered to make the required payments into the registry of the court pending the final outcome of review of amended Order No. 27 and would further be enjoined from violating the other requirements of Order No. 27. Now that the plaintiffs have unsuccessfully exhausted their administrative remedies, they ask this Court to review the action of the Secretary and rule that it is not in accordance with law. See 7 U.S.C.A. § 608c(15)(B).

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[1] Unless otherwise indicated the word "plaintiffs" will refer to the private parties and the word "defendant" will refer to the United States.

The government's original enforcement action (under which the plaintiffs continue to pay monies due into this court) and the plaintiffs' suit for review of the administrative ruling have been consolidated in this action. Since there is no genuine dispute as to the material facts and purely legal questions appear to be raised by the pleadings, both parties have moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See *Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860 (3rd Cir. 1945).

Our ruling here will thus determine the proper disposition to be made of these funds being deposited in the registry of the court pursuant to our Order in *United States* v. *Lehigh Valley Cooperative Farmers*, *supra*, and will, of course, affect the future operation of amended Order No. 27 itself.

Also before the Court at this time is a motion by the government to modify our temporary injunction of October 4, 1957, in the case of *United States* v. *Lehigh Valley Cooperative Farmers*, *supra*. The government bases this motion upon a further amendment to Order No. 27, effective September 1, 1958, which it claims has changed the essential facts upon which the injunction rested. This further amendment gives to handlers in the position of the present plantiffs a right to *elect* a nonpool plant status (which they were by necessity, under the facts which led this Court to grant the injunction) or face full regulation under Order No. 27. Since the economic burden of full regulation as a pool plant would be much worse than that of a partially regulated nonpool plant, the plaintiffs have naturally elected nonpool status.

The government argues that by *electing* as of September 1, 1958 to be a nonpool plant, the defendants in the enforcement proceeding are thereafter obliged to pay money due under amended Order No. 27 directly to the Producer Settlement Fund and not into the registry of this court. It points out that the new provisions of Order No. 27 have not been contested by the defendants as unlawful and that this Court must therefore order them to comply with it.

On the other hand, plaintiffs argue that there has been no essential change in the situation which gave rise to the injunction and therefore the motion to modify it should be denied.

To properly understand the present controversy it is necessary to briefly describe the extremely complex operation of Federal milk control in general and the history and operation of Order No. 27 in particular. A full explanation of the problems involved in the regulation of the milk industry will not be attempted.[2]

Milk is generally not sold by the farmer (referred to as "producer" in the milk industry) directly to the consumer. Rather there is an intermediate step in its distribution. From the farmer it goes to a dealer (referred to as a "handler" in the milk industry).[3] One handler will usually receive the raw milk from a number of producers. He in turn sells it in the form of fluid milk, cream or milk products. Since the return of profit on fluid milk is greater than on cream and the return on cream in turn greater than on milk products (such as butter, cheese, etc.), the producer whose handler sells a larger portion of his milk in fluid form could expect a greater price for his raw milk, while producers whose raw milk happens to be sold for nonfluid milk purposes could expect a correspondingly lower price for his milk. To avoid the danger to a stable market which is produced by this difference in the price of milk according to its particular utilization, the government has adopted as a basic scheme of regulation in most of its 115 marketing orders, a plan whereby each producer of milk is paid a uniform price for all of the raw milk which he delivers to his handler, *regardless of what particular use it is thereafter put to by his handler.*

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[2] For the background and history of Order No. 27, see *Nebbia* v. *New York*, 291 U.S. 502 (1934); *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939). See also *Brooks, The Pricing of Milk Under Federal Marketing Orders*, 26 Geo. Wash. L. Rev. 181 (1958).

[3] In certain instances an individual farmer or a group of farmers may also act as "handler" for their own milk or for milk of others.

Briefly this is accomplished as follows: The Market Administrator determines a "class price" which a handler must pay for each of the different uses he makes of the fluid milk (i.e., a class price for milk which he sells as fluid milk, a class price for milk which he sells as cream, and a class price for milk which he sells as a milk product.) He then computes the value of all of the milk used by a handler by multiplying the quantity of milk the handler uses for each class by the class price and totaling these sums. This amount is then divided by the total quantity of milk used by the handler to give him the *uniform unit price* to be paid each producer for the number of units of milk he produces.

Furthermore in a marketwide pool a *uniform unit price* is determined on a marketwide basis rather than on an individual handler basis. This is accomplished by totaling the marketwide use for each class, times the class price, divided by the the total volume of milk used in the whole market. In such a market there is need for a *Producer Settlement Fund.* Thus a handler whose own total use value of milk for a set period is *greater* than his total payment at the uniform unit price (which is the case where a handler sells the greater part of his milk as fluid milk) must pay the difference into the *Producer Settlement Fund.* Each handler whose own total use value of milk is *less* than his total payments to producers at the uniform price (which would be the case where a handler sold the greater part of his milk as milk products) is entitled to withdraw the difference from the Producer Settlement Fund. *Grant* v. *Benson*, 229 F. 2d 765, 767 (D.C. Cir. 1955), *cert. denied* 350 U.S. 1015 (1956). In this way the producers are compensated solely according to the amount of raw milk which they handle and not according to the particular use to which their milk may be put.

The plants at which the milk is received by these handlers who participate in the Producer Settlement Fund are called "pool plants." Prior to the August 1, 1957 amendment to Order No. 27, those handlers who sold less than one-half of their total milk sales in the Order No. 27 area could not

have their plants recognized as pool plants and were not fully regulated under Order No. 27. Both of the plaintiffs in this action make only a small per cent of their sales in the Order No. 27 area (Sunerest Farms approximately 5% and Lehigh Valley approximately 4%), the remainder being sold in Pennsylvania. Therefore, they were not fully regulated pool plants under Order No. 27.

Plaintiffs and other nonpool plants like them, which are not fully regulated by Order No. 27, posed a fundamental threat to the regulatory scheme above described. This threat is more than a simple competitive one between competing milk dealers. Rather it involves a danger accentuated by the government's uniform price-regulating program itself, which is imposed upon the regular suppliers to this area. Thus, if nonregulated milk handlers (such as plaintiffs) are allowed to sell their milk in fluid form in the regulated area, they theoretically displace an equal volume of fluid milk sales which would ordinarily be made by fully regulated members. This automatically decreases the uniform unit price paid to all regular Order No. 27 producers for raw milk in the market area, since fluid milk sales produce the highest unit return of all classes of sales. Therefore *all* of the pool producers who regularly supply the Order No. 27 area feel this loss. If such sales become substantial enough they could disrupt the basic plan of regulation. At any rate they admittedly have a harmful effect upon every fully regulated producer under Order No. 27. Moreover there is a constant temptation for those nonregulated handlers, whose primary supply areas lie outside of North Jersey and New York, to dump that raw milk which they can not sell as liquid milk in their own regular supply areas into the Order No. 27 area.

This problem of outside producers selling fluid milk in the Order No. 27 area results in great part from the nature of fluid milk itself and from the peculiar marketing problems involved in its distribution. Fluid milk cannot be stored for a long period of time. Moreover the production of fluid milk varies with the season; less milk being

produced in the fall and winter than in the spring and summer. Yet the demand for fluid milk is fairly constant. Thus, if there is to be an adequate supply of fluid milk during less productive seasons there must necessarily be a surplus in the more productive seasons. The economic burden created by this surplus milk (including necessary reserves and seasonal surpluses) which must be turned into far less remunerative products, such as butter and cheese, might, if it fell onto the shoulders of a few dairymen, force them out of business. To avoid the dangerous effect which cut-throat competition during the overproductive season might have upon dairymen, and thereby insure the highly populated areas of metropolitan New York an adequate supply of fluid milk during all seasons, the Federal government promulgated Order No. 27 with its uniform market price scheme essentially designed to distribute this burden of necessary surplus among all of the regular suppliers in that market area. Although the regular suppliers of milk to the Order No. 27 area together can withstand the harmful effect of these sales of fluid milk by nonregulated handlers, the practice if not checked in some way could disrupt the orderly regulation of milk in the area in question. All of the parties seem to agree that these sales from outside handlers if unchecked pose a real problem to the effective operation of Order No. 27. The present dispute stems from the *method* used to avoid this problem.

To meet the problem the Secretary of Agriculture wrote into Order No. 27 a provision for *partial regulation* of those handlers who receive milk at nonpool plants and who traditionally distributed only a small part of their milk supply in the Order No. 27 area. Its purpose was presumably to discourage the dumping of fluid milk into the area (which we have pointed out results in lowering the uniform market price for all producers) and also to distribute part of the surplus milk burden of this area onto those handlers who do not regularly supply it. Essentially this partial regulation required nonpool plant handlers to make a *compensatory payment* to the Producer

Settlement Fund for all of the fluid milk they distribute in the Order No. 27 area. These payments help to increase the uniform unit price paid to the regulated suppliers of Order No. 27—and they in no way benefit the farmers who in fact supplied the milk to these nonregulated handlers. The payments are designed to offset the otherwise harmful effect created by such sales. The compensatory payment in the case of fluid milk sales is based on the difference between the Class I (fluid milk) class price and the Class III (milk-products) class price of Order No. 27. For every unit of liquid milk sold by plaintiffs or other partially regulated handler, this difference must be paid into the fund. However, if Order No. 27 pool milk is in short supply as demonstrated by a stated formula, such charge is not made.[4]

There are three specific sections of Order No. 27 which the plaintiffs attack. First is Section 927.3 which extends the area covered by the former Order to include a number of counties in northern New Jersey. They base their attack on this section upon the alleged failure of the Secretary of Agriculture to give proper notice of the promulgation hearings at which evidence was presented in support of the amendment.

The remaining two sections which the plaintiffs attack are Sections 927.83 and 927.84 (hereinafter referred to as the compensatory payment provisions). These contain the compensatory payment provisions for which nonpool handlers such as the plaintiffs are liable. They base their attack on these sections upon substantive as well as procedural grounds. Thus they argue that these payments which must be made on all of their fluid sales in the Order No. 27 area (essentially based upon the difference between the Class I and Class III price of milk under

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[4] The above is an extremely simplified description of the "exquisitely complicated" milk problem. Other provisions of Order No. 27 which may be important in understanding the contentions of the respective parties will be pointed out in the course of the opinion.

Order No. 27): (1) are open to the same *notice* objections raised against Section 927.3; (2) are in direct conflict with Section 608c (5)(A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A. § 601, et seq., which calls for *uniform* prices as to all handlers (subject only to certain adjustments admittedly not involved here); (3) are not supported by the evidence introduced at the promulgation hearings; and (4) are not authorized by any provision of the Act. The government denies each of these contentions.

## The Notice Problem

As already stated, the plaintiffs attack the amendment to Order No. 27 which effected the incorporation of part of northern New Jersey into its coverage. They argue that (1) there was a lack of due notice of the hearings leading up to the amendment in question; (2) there was improper use of the record of the various hearings by the Secretary; and (3) there were improper rulings and orders by the Secretary.[5] Upon close examination it becomes evident that all of these objections develop from the notice problem, and stand or fall with it. That problem stated simply is: Did the Secretary of Agriculture give the plaintiffs due notice of, and an opportunity for hearing upon the proposed change in Order No. 27?

Such notice is required by § 608(c)(3) of the Act, 7 U.S.C.A.[6] Pursuant to this Section, the Secretary of

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[5] These rulings had to do with the plaintiffs' objection to the opening of the March 5, 1957 hearing (which objection rested upon the alleged lack of proper notice of that meeting) and with his request to recall for cross-examination certain witnesses who had testified at earlier hearings. See plaintiffs' brief, pages 61 and 62.

[6] The Administrative Procedure Act, 5 U.S.C.A. § 1001, *et seq.* contains *general* provisions calling for due notice to interested parties and an opportunity for a hearing upon any proposed order. Although the plaintiffs rely primarily upon the notice requirement of the Agricultural Marketing Agreement Act and the Secretary's Regulation, the court's ruling answers any claim based upon the more fundamental requirements of the former Act.

Agriculture issued a Regulation, 7 C.F.R. § 900.4, which stated that the time for hearings shall not be less than fifteen days after the date of publication of notice in the Federal Register, except in case of *amendments* to existing orders, in which case three days notice would suffice. After reviewing the evidence presented on this point, we are completely satisfied that the plaintiffs were in fact given due notice of the hearings which led to the promulgation of the amendment to Order No. 27 and also had opportunity for a full hearing upon the amendment.

This very problem was recently before Judge Wortendyke of the United States District Court for the District of New Jersey in the case of *Ideal Farms, Inc. and Franklin Lakes Dairy Products, Inc. v. Benson*, 181 F. Supp. 62 (D.N.J. 1960), and we need add little to what was said there. Although the parties are different, so as to bar any government claim of res adjudicata or collateral estoppel, the notice problem in both of these cases is essentially the same. We are therefore persuaded by Judge Wortendyke's opinion.

As therein pointed out, the plaintiffs' notice argument in that case (as well as here) rests upon the fact that all of the notices by the Secretary *prior* to the notice of February 28, 1957, which said notices preceded 84 hearings at which over 12,000 pages of testimony were taken, stated that the hearings were for the purpose of establishing a *separate* milk order for northern New Jersey. The plaintiffs argue that such a notice was in effect no notice at all as far as any order *incorporating* the northern New Jersey area into Order 27 is concerned. We flatly reject this contention as too narrow and unrealistic an interpretation of the notice requirement contained in the Act. Plaintiffs admit that such a separate order could quite conceivably have contained terms identical with those of Order No. 27—and in fact a proposal for such a separate identical order was made.[7] Moreover numerous separate

[7] See 21 F.R. 3544-3575.

provisions identical with those contained in Order No. 27 were proposed and discussed at these meetings *which were attended by the plaintiffs*. Willis F. Daniels, Esquire, counsel for the plaintiffs in the present action, was of counsel for the plaintiffs in the New Jersey action also.

Moreover the February 28, 1957 notice clearly satisfied the requirements of both the Act and the Secretary's Regulation on this point and pursuant to this valid notice there followed hearings commencing on March 5, 1957 and lasting until March 29, 1957. These consisted of 18 full days of hearings, all of which were attended by the plaintiffs. They continued beyond the 15-day notice time which plaintiffs have argued was required. If in the course of some 102 days of hearings and 16,000 pages of testimony, the plaintiffs failed to submit any evidence which would dissuade the Secretary from adopting the amended Order now under attack—and nowhere in their brief or at oral argument did the plaintiffs attempt to set forth such evidence—we do not feel that such failure justifies this Court's striking down the Order. In short, after an examination of the whole record, we are convinced that plaintiffs' notice argument is a technical one only and that they have not suffered any real harm by virtue of the various notices in dispute, but were in fact fairly apprised of the type of milk order which would be promulgated and had an adequate opportunity to be heard upon the proposed amendment to Order No. 27. See *Morgan* v. *United States*, 304 U.S. 1 (1938).

Plaintiffs' argument that there was improper use of the record stems from its contention that although the Secretary relied upon all of the hearings between June 18, 1956 and March 29, 1957, at best, only one of these hearings was preceded by proper notice to the plaintiffs. Therefore, they argue, the resulting amendment based upon these "improper" hearings must be struck down, even if the last hearings were held to have satisfied the notice requirement.

Again we must take issue with the plaintiffs. The Secretary will not be completely denied the benefit of this wealth

of proposals and statistics amassed during the course of these hearings on the regulation of milk in northern New Jersey, simply because that regulation ultimately took the form of an amendment to the already existing Order No. 27, rather than as a totally separate order. As the government points out, the comprehensive or single order, although not directly in issue in the earlier hearings was at least a subsidiary issue.[8] All of the facts adduced were relevant to the issue of whether there should be any Federal regulation of northern New Jersey and what form those regulations should take. It is enough that the final series of hearings took up the question of the desirability of a single comprehensive order, and that throughout those 18 days of hearings, counsel for the plaintiffs actively participated and never requested a continuance to prepare evidence to meet the allegedly "new" issue of a single order. Upon a review of the whole record, we feel that the conclusion is inescapable that the plaintiffs have not been prejudiced by any alleged errors in notice or in the Secretary's use of the entire 108 days hearing record.

ARE THE COMPENSATORY PAYMENT PROVISIONS OF THE AMENDED ORDER INCONSISTENT WITH § 608c(5)(A) OF THE ACT?

Section 608c(5) reads:

> "In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section no others:
>
> (A) Classifying milk in accordance with the form which or the purpose for which it is used and fixing or providing a method for fixing minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers.

[8] See for instance, p. 23 of the government's brief.

Such prices shall be *uniform as to all handlers*, subject only to adjustment for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk or any use classification thereof, is made to such handlers.") (Emphasis supplied).

The plaintiffs vigorously assert that compensatory payment provisions in the present Order (pursuant to which they continue to make payments into this Court under our October 4, 1957 injunction) are in direct conflict with the above provision and are therefore void. This contention rests upon the authority and reasoning of the 2nd Circuit Court of Appeals in *Kass* v. *Brannan*, 196 F. 2d 791 (1952), *cert. denied* 344 U.S. 891. If the compensatory payment provisions are found to be inconsistent with the Agriculture Marketing Agreement Act they of course must fail. Although the government and those parties who filed a brief amicus curiae make an attempt to distinguish this case, it is evident that their principal defense to this legal opinion is that it was erroneously decided and therefore should be rejected by this Court. We have read the *Kass* case carefully and are convinced that the government has failed to distinguish it in principle from the present case.

The facts and holding of that case are briefly as follows: The plaintiff was a handler who distributed nonpool milk in the New York area and thus was not fully regulated under Order No. 27. He was however subject to partial regulation since his plant was licensed by the New York health authorities. He purchased cream and condensed milk from an Ohio nonpool plant and sold it in New York. He was billed by the Market Administrator for a compensatory payment under the former §927.83, the amount being computed by essentially the same method employed in our own case (i.e., the difference between the Class IIA (New York cream) price and the Class IVA (New York butter price).) He objected to these payments and after failing in admin-

istrative review was unsuccessful in his review action in the District Court under 7 U.S.C.A. § 608c(15)(B). On appeal, the Second Circuit reversed the District Court which had dismissed his complaint, and *held* that the compensatory payment provisions were inconsistent with §608c(5)(A) of the Agricultural Marketing Agreement Act. They viewed the payment made under the compensatory provisions of the Order as a part of the "minimum price" as that term was used in §608c(5)(A) and since this payment *plus* the actual cost to the plaintiff handler (i.e., the price which he paid to the Ohio concern) would result in a cost to him higher than the cost of like cream and condensed milk to pool-regulated handlers, they concluded that such a requirement established a minimum price which was not *uniform for all handlers* as required by §608c(5)(A). *Kass* v. *Brannan*, *supra*, at p. 796.

If the *Kass* case is followed, we view it as inescapable that the compensatory payment provisions of amended Order No. 27 must be struck down as not in accordance with the Agricultural Marketing Agreement Act. We reach this conclusion after a close reading of the *Kass* opinion in conjunction with the facts of the case before us. The facts in these two cases are not identical and the government has carefully set out the several differences. Nevertheless we are convinced that these differences are not determinative. Although we might be tempted to grasp at them and perhaps even develop others in an effort to avoid the serious responsibility of striking down a Federal Regulation, any attempt to accept the *Kass* case as good law and at the same time sustain the compensatory payment provisions as they now appear in the present Order would, in our opinion, be illogical and inconsistent.[9]

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[9] The government makes much of the fact that plaintiff Lehigh Valley Cooperative Farmers, Inc. which has also been regulated under Federal Order No. 61 for Philadelphia since July 1, 1957 and is thereby charged compensatory payments pursuant to § 927.83(b)(1), rather than § 927.83(b)(2) which regulates the compensatory payments of plaintiff Sunerest Farms, Inc. Actually the amount

Moreover we feel bound by the holding of the Second Circuit in the *Kass* case. Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret §608c(5), we do not feel justified in now rejecting the interpretation there placed upon §608c(5)(A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight. The government was unsuccessful in its effort to have the Supreme Court review it. Instead it chose to delete that form of compensatory payment provision from the Order. With the mere passage of time and by reinstating "compensatory payments" they now ask this Court to sustain it. When we further take into consideration the fact that the Second Circuit has had frequent occasion to deal with the Agricultural Marketing Agreement Act and with Order No. 27,[10] and the Circuit's jurisdictional boundaries encompass metropolitan New York (the area which Order No. 27 was

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of compensatory payments for each will be the same, since § 927.83 (b)(1) specifically provides that payments under that section "shall be at the rates set forth in subparagraph (2) (i.e., Suncrest's rate) if the other Order permits . . . [certain deductions]". Order No. 61 does permit such deductions. Therefore Lehigh Valley must also pay the difference between the Class I and Class III Order No. 27 price into that Producer Settlement Fund. Although it is then required to pay only the Class III price to its producers under the terms of Order No. 61, the uncontroverted facts in this case are that it can NOT purchase raw milk from its producers at that low price and in fact is forced to pay more for it. Thus its *actual cost* plus the compensatory payment is substantially higher than the cost to fully regulated Order No. 27 handlers. This runs afoul of the *Kass* holding. For this reason we have not distinguished between the plaintiffs throughout our opinion. If *Kass* is followed, both plans seem equally objectionable.

[10] *General Ice Cream Corp.* v. *Benson*, 217 F. 2d 646 (2nd Cir. 1954); *Crowley's Milk Co.* v. *Brannan*, 198 F. 2d 861 (2nd Cir. 1952); *New York State Guernsey Breeders Co-op., Inc.* v. *Wickard*, 141 F. 2d 805 (2nd Cir. 1944); *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969 (2nd Cir. 1943); etc.

originally designed to regulate), we do not feel justified in rejecting that opinion.

The government cannot argue (nor has it attempted to argue) that the total cost to the plaintiffs of the liquid milk which they sell in northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the *total* cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said §608c(5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass* v. *Brannan*, *supra*.

## Are the Compensatory Payment Provisions of Order No. 27 Supported by the Record?

The plaintiffs also argue that the compensatory payment provisions should be struck down for the further reason that they are unsupported by the evidence in the record. In the event that our ruling based upon the *Kass* case is reversed, and it is likely to be subjected to appellate review, this argument would return to us for decision—with the facts exactly as they appear now. We therefore feel it proper at this time to pass upon this contention.

The allegation that an administrative order of the Secretary is not supported in the record of the hearings leading up to its enactment, would present a tremendous problem for the Court in this type case *if* we were required to read the whole record consisting of some 16,000 pages of testimony along with numerous complicated exhibits—and then weigh the propriety of that order in the light of all of that evidence. Neither our time nor our talents in this very complicated area of Federal regulation would permit the accomplishment of such an undertaking. The Court views its task as a much narrower one. Upon review of this issue,

all that the Court need find is sufficient evidence in the record to support the Secretary's order.[11] Once this is done, the Court need go no further.

From a reading of those portions of the administrative record which the government has annexed to its brief as supporting the amendment under attack, the Court is convinced that there is sufficient evidence to support a finding of need for some form of Federal regulation of the sale of milk and its products by nonregulated handlers in the Order No. 27 area.[12] The form of regulation chosen by the Secretary (i.e., so-called compensatory payments to the producer Settlement Fund) was otherwise calculated to correct this problem and would likely produce the desired result if it did not run afoul of § 608c(5)(A) of the Agricultural Marketing Agreement Act. Therefore, were we to be found in error in our holding that law as expressed in the *Kass* opinion requires us to strike down the present compensatory payment provisions of Order No. 27, we believe those provisions should otherwise stand as supported by the record.

ARE THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 AUTHORIZED BY THE AGRICULTURAL MARKETING AGREEMENT ACT?

Like the problem of whether there is support in the record for the adoption of the compensatory payment provisions of Order No. 27, we feel it proper to pass upon the question of whether the Act authorizes such provisions at this time, even though we might avoid doing so in light of our holding that those provisions are otherwise invalid.

If such compensatory payment provisions are authorized by the Act, we think their authorization must be found in § 608c(7)(D). That section authorizes the Secretary to in-

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[11] *Wawa Dairy Farms* v. *Wickard*, 149 F. 2d 860 (3rd Cir. 1945); *New York State Guernsey Breeders Co-op., Inc.* v. *Wickard*, 141 F. 2d 805 (2nd Cir. 1944).

[12] See government's brief, pp. 36-47.

clude as terms in a milk order, those "incidental to and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order." The plaintiffs, as already pointed out, take the position that since compensatory payments are in fact inconsistent with § 608c(5)(A) of the Act, they are not authorized by § 608c(7)(d). With this we agree. *Kass* v. *Brannan*, *supra*. However, should we be wrong in this conclusion, the question would remain: Are such provisions "incidental to . . . and necessary to effectuate the other provisions of such order"? We think they would be.[13]

Whether provisions are "incidental and necessary" to effectuate an order of the Secretary as those terms are used in § 608c(7)(D) will depend upon the particular order in which they appear. From an examination of Order No. 27 *without* the compensatory payment provisions in dispute., and keeping in mind the milk supply problem of the area involved, we believe that the compensatory payment provisions are calculated to carry into effect the powers granted to the Secretary by the Act, as those powers are exercised in the remaining sections of Order No. 27. This is enough to bring them within the terms of § 608c(7)(D). *Brennan* v. *Stark*, 342 U.S. 451 (1952).

By a plan of full regulation of those who regularly supply the Order No. 27 area, based upon a marketwide pool, the Secretary has distributed the burden of surplus milk and its resulting decreased return in the form of milk products, upon *all* of the fully regulated handlers and their suppliers. So long as there is a reasonably high percentage of fluid milk sales and a corresponding reasonably low percentage of nonfluid sales (whatever those relative proportions might be for a healthy market) the return to the farmers will be adequate. Sales of fluid milk in the area by

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[13] The majority in the *Kass* case expressly reserved this question (at p. 797), and Judge Learned Hand, dissenting in that case, also failed to pass upon it (at p. 799).

nonregulated handlers pose a fundamental threat to this adequate amount of return. If unchecked, they could seriously disrupt the whole regulatory plan. The compensatory payment provisions (which provisions appear in varying form in almost all of the government's milk regulating orders) are calculated to check or greatly minimize this threat. Thus they are calculated to carry into effect Order No. 27 and are authorized by the Act as "incidental" and "necessary" to carry out its terms, § 608c(7)(D).

DOES THE SEPTEMBER 1, 1958 AMENDMENT TO ORDER NO. 27 REQUIRE MODIFICATION OF THIS COURT'S INJUNCTION?

Subsequent to our injunctive order in the case of *United States* v. *Lehigh Valley Cooperative Farmers*, 161 F. Supp. 885 (E.D. Pa. 1957), the Secretary saw fit to further amend Order No. 27 so as to make handlers, such as plaintiffs, who sold milk in the Order No. 27 area fully regulated handlers unless they *elected* to be nonfully regulated handlers subject to the compensatory payment provisions of the Order (i.e., it forced the plaintiffs to "elect" that status which they had theretofore held automatically). Since the economic burden of full regulation would be even greater than is incurred under the compensatory payment provisions of the Order, the plaintiffs have of course made this "election." The government now takes the position that by making this "election", and failing to contest the legality of this amendment before the Secretary of Agriculture, the plaintiffs are precluded from raising any objection here to payments due after this "election", (i.e., after September 1, 1958).[14]

We must presume that this amendment to Order No. 27 was enacted by the Secretary to meet a real need in the milk

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[14] Although the government made this argument in its brief, there is real doubt as to whether it in fact contends that *Lehigh Valley* should be required to make payments under the later amended order, directly to the Market Administrator. See the remarks by government counsel at pages 4 to 7 of the transcript.

industry and not to circumvent our injunction in the *Lehigh Valley Cooperative Farmers* case. To view it as otherwise would be to impute to an administrative department interference with the orderly administration of justice by action which would infringe upon the integrity of our judicial process. Nevertheless in view of our holding that the compensatory payment provisions are invalid, we do not feel that this amendment calls for modification of our original injunction. Thus, if the compensatory payment provisions are struck down, no money should be paid the Market Administrator under those provisions. This is true regardless of whether plaintiffs were nonpool plants by choice or by necessity, unless we were to hold that by striking down the compensatory payment provisions, the Court automatically forced the plaintiffs into a fully regulated status under the terms of the September 1, 1958 amendment to Order No. 27. We flatly reject this conclusion. It may be that the Secretary could enforce full regulation upon handlers such as the plaintiffs by an appropriate order. See *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (3rd Cir. 1949), *cert. denied* 338 U.S. 905. We do not feel that by promulgating the September 1, 1958 amendment granting handlers an "election" between full and partial regulation, he intended to do so.

In short, if our present Order declaring the compensatory payment provisions of Order No. 27 unlawful is upheld, we think that by necessity the September 1, 1958 amendment must also fail. This conclusion does no violence to that line of cases which stand for the proposition that a district court can only review those matters which have *first* been presented to the Secretary of Agriculture, § 608c(15)(A), 7 U.S.C.A. Rather it is based upon the fundamental proposition that where one provision of an Act is critically dependent upon another provision of that same Act, and the latter provision is struck down, the former falls by necessity.

Conversely if the compensatory payment provisions of Order No. 27 are, upon review, found to be in conformity

with the Agricultural Marketing Agreement Act and therefore lawful, the plaintiffs will owe the Market Administrator for the whole period from the time that Order No. 27 was amended to include northern New Jersey to the present. To force plaintiffs to make payments directly to the Market Administrator after September 1, 1958, pending such final review, would be to defeat the very purpose of our original injunction.

At this point we might add a word concerning the government's argument based upon the case of *Titusville Dairy Products Co.* v. *Brannan, supra.* It advanced the argument throughout its brief in support of the motion for summary judgment, and most astutely in its brief in support of the motion to modify our injunction. The argument took this form: The Secretary undoubtedly has the power to *fully regulate* handlers such as the plaintiffs. *Titusville Dairy Products Co.* v. *Brannan, supra.* But partial regulation under the present compensatory payment provision is economically less onerous regulation than full regulation. Therefore, the Secretary undoubtedly has the power to partially regulate handlers such as the plaintiffs under the present compensatory payment provisions. Accepting both premises as true for argument sake, the conclusion does not follow. Any form of regulation, no matter how slight its economic burden, *must conform to the Act of Congress by virtue of which that regulation* purports to be promulgated. The present scheme of partial regulation does not. *Kass* v. *Brannan, supra.* Therefore it must fail.

For many years prior to the promulgation of amended Order No. 27, which incorporated northern New Jersey into its coverage, each of the plaintiffs here had regularly established retail milk routes in and around Phillipsburg, New Jersey, which city is located immediately adjacent to that part of Pennsylvania in which the plaintiffs' distributor plants are located. The economic effect of the amended Order was that plaintiffs were required by the terms of the Order to make payments to the Producer

Settlement Fund for every quart of fluid milk which they thereafter sold in northern New Jersey. Under no circumstances could they participate in any return from the Producer Settlement Fund into which they were required to pay. However, this fact standing alone would not preclude the Secretary, viewing the situation areawise, in including Phillipsburg, New Jersey, in the area set aside for the operation of amended Order No. 27. Nevertheless, in the light of the *Kass* v. *Brannan* decision, *supra*, the Order as promulgated did not comply with Section 608c(5)(A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producer Settlement Fund by them must be stricken down.

Counsel for plaintiffs in Civil Actions No. 26048 and No. 26109 will submit, within twenty (20) days hereof, a proposed form of Decree consistent with the foregoing opinion.

FINAL JUDGMENT

CIVIL ACTION No. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*v.*

LEHIGH VALLEY COOPERATIVE FARMERS AND SUNCREST FARMS, INC., DEFENDANTS

CIVIL ACTION No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, INC., PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

CIVIL ACTION No. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*v.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

FINAL JUDGMENT

The above entitled actions, having been consolidated, came before the Court; the Plaintiffs, (Defendants in No. 23268) having appeared by their attorneys, Daniels and Swope, Esquires, of Harrisburg, Pennsylvania, and Weston C. Overholt, Jr., Esquire, of Philadelphia, Pennsylvania; the Defendant (Plaintiff in No. 23268) having appeared by John M. Durbin, Esquire, of the United States Department of Agriculture, and Walter E. Alessandroni, Esquire, United States Attorney, of Philadelphia, Pennsylvania; counsel for both Plaintiffs and Defendant having made motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in Civil Actions No. 26048 and No. 26109; argument in open Court having been had;

briefs having been filed by both parties; and this Court having filed its opinion herein, NOW it is

ORDERED, ADJUDGED AND DECREED

1. That the plaintiff's motion to modify the preliminary injunction issued by this Court on October 4, 1957, in the action of United States of America v. Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., Civil Action No. 23268, and for a mandatory injunction ordering that all money heretofore paid into the registry of this Court for delivery periods beginning with September 1958 be paid to the Market Administrator of Order No. 27, as amended, and that defendants make subsequent regular monthly payments in accordance with the terms and provisions of Order No. 27, as amended, to the Market Administrator, is hereby DENIED, and such modification and mandatory injunction be and they are hereby REFUSED;

2. That the complaint in United States of America v. Lehigh Valley Cooperative Farmers and Sunerest Farms, Inc., Civil Action No. 23268, be and it is hereby DISMISSED; that, subject to the provisions in paragraph 3 hereof, the preliminary injunction issued by this Court on October 4, 1957, in this action be and it is hereby VACATED AND DISSOLVED; that the defendants be allowed to withdraw all monies heretofore paid by them into the registry of this Court pursuant to the injunction granted by this Court on October 4, 1957, and that the Clerk of this Court is hereby directed to draw checks in favor of the respective defendants for the amounts heretofore deposited into the registry of this Court;

3. That the provisions in paragraph 2 of this judgment and the execution or enforcement thereof be and they are hereby stayed for a period of twenty-one (21) days from the date of this Order pending appeal by the Government and/or application by the Government to the United States Court of Appeals for the Third Judicial Circuit for a further stay in the execution of this judgment and order.

4. That the hearing notices required to be given by the Secretary prior to the administrative hearings on the proposed amendment to Order No. 27 were valid and in accordance with law.

5. That §§ 927.83 and 927.84 in Order No. 27, as amended, effective August 1, 1957, insofar as such provisions require a compensatory payment to the Producer-Settlement Fund by a handler operating a nonpool plant on Class 1-A and Class II milk distributed from such nonpool plant within the marketing area of Order No. 27, as amended, measured by the difference between the Order No. 27 Class III price and the Order No. 27 Class 1-A or Class II price, are not in accordance with law in that they violate the uniform price provision in § 8c(5)(A) of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 608c (5)(A));

6. That the said actions styled Lehigh Valley Cooperative Farmers, Inc. v. Ezra Taft Benson, Civil Action No. 26048, and Suncrest Farms, Inc. v. Ezra Taft Benson, Civil Action No. 26109, be and they are hereby remanded to the Secretary of Agriculture of the United States for action consistent herewith.

BY THE COURT:
THOMAS J. CLARY,
*J.*

Dated: June 1, 1960.

NOTICE OF APPEAL

CIVIL ACTION NO. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

NOTICE OF APPEAL

TO THE CLERK OF THE U. S. DISTRICT COURT:—

Please be advised that the United States of America herewith appeals to the United States Court of Appeals for the Third Circuit from the Decision and Order of Judge Clary, dated June 1, 1960, remanding the above-entitled action to the Secretary of Agriculture for further action.

WALTER E. ALESSANDRONI,
*United States Attorney.*

HENRY R. HEEBNER, JR.,
*Assistant United States Attorney.*

DATED: JUNE 16, 1960.

cc—WESTON C. OVERHOLT, JR., ESQUIRE,
DANIELS & SWOPE, ESQUIRES,
Assistant Attorney General,

JOHN M. DURBIN, ESQUIRE,
*Department of Agriculture.*

NOTICE OF APPEAL

(Filed: June 16, 1960)

CIVIL ACTION No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

NOTICE OF APPEAL

TO THE CLERK OF THE U. S. DISTRICT COURT:—

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WALTER E. ALESSANDRONI,
*United States Attorney.*

HENRY R. HEEBNER, JR.,
*Assistant United States Attorney.*

DATED: JUNE 16, 1960.

cc—WESTON C. OVERHOLT, JR., ESQUIRE,
DANIELS & SWOPE, ESQUIRES,
Assistant Attorney General,
JOHN M. DURBIN, ESQUIRE,
*Department of Agriculture.*

NOTICE OF APPEAL

CIVIL ACTION No. 26048

LEHIGH VALLEY COOPERATIVE FARMERS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

NOTICE OF APPEAL

TO THE CLERK OF THE U. S. DISTRICT COURT:—

Please be advised that Ezra Taft Benson, Secretary of Agriculture of the United States of America, herewith appeals to the United States Court of Appeals for the Third Circuit from the Decision and Order of Judge Clary, dated June 1, 1960, remanding the above-entitled action to him for further action.

WALTER E. ALESSANDRONI,
*United States Attorney.*

HENRY R. HEEBNER, JR.,
*Assistant United States Attorney.*

DATED: JUNE 17, 1960.

cc—WESTON C. OVERHOLT, JR., ESQUIRE,
DANIELS & SWOPE, ESQUIRES,
Assistant Attorney General,
JOHN M. DURBIN, ESQUIRE,
*Department of Agriculture.*

AMENDED NOTICE OF APPEAL

CIVIL ACTION No. 26109

SUNCREST FARMS, INC., PLAINTIFF,

*vs.*

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, DEFENDANT

AMENDED NOTICE OF APPEAL

TO THE CLERK OF THE U. S. DISTRICT COURT:—

Please be advised that Ezra Taft Benson, Secretary of Agriculture of the United States of America, herewith appeals to the United States Court of Appeals for the Third Circuit from the Decision and Order of Judge Clary, dated June 1, 1960, remanding the above-entitled action to him for further action.

WALTER E. ALESSANDRONI,
*United States Attorney.*

HENRY R. HEEBNER, JR.,
*Assistant United States Attorney.*

DATED: JUNE 17, 1960.

cc—WESTON C. OVERHOLT, JR., ESQUIRE,
DANIELS & SWOPE, ESQUIRES,
Assistant Attorney General,

JOHN M. DURBIN, ESQUIRE,
*Department of Agriculture.*

NOTICE OF APPEAL

(Filed: June 16, 1960)

CIVIL ACTION NO. 23268

UNITED STATES OF AMERICA, PLAINTIFF,

*vs.*

LEHIGH VALLEY COOPERATIVE FARMERS AND SUNCREST FARMS, INC., DEFENDANTS.

NOTICE OF APPEAL

TO THE CLERK OF THE U. S. DISTRICT COURT:—

Please be advised that the United States of America hereby appeals to the United States Court of Appeals for the Third Circuit from the Decision and Order of Judge Clary, dated June 1, 1960, dismissing plaintiff's Complaint and vacating and dissolving the preliminary injunction issued by the Court on October 4, 1957.

WALTER E. ALESSANDRONI,
*United States Attorney.*

HENRY R. HEEBNER, JR.,
*Assistant United States Attorney.*

DATED: JUNE 16, 1960

cc—WESTON C. OVERHOLT, JR., ESQUIRE,
DANIELS & SWOPE, ESQUIRES,
Assistant Attorney General,
JOHN M. DURBIN, ESQUIRE,
*Department of Agriculture.*

## EXCERPTS FROM TESTIMONY

REVIEW PROCEEDINGS RE SUNCREST

PROCEEDINGS

[19] Mr. DANIELS: I would ask your Honor to take judicial notice of 21 FR 3537, in so far as it relates to the proposed extended territory appearing in the proposal of United, in so far as it relates to territory, suggested territory made by the government committee of Northern New Jersey, United Milk Producers of New Jersey, and Eastern Milk Producers Cooperative Association of Northern New Jersey.

Examiner BAIN: Is that the original notice of the promulgation hearing of May 18th?

Mr. DANIELS: Yes, sir.

Examiner BAIN: Do you want to offer just part of that?

Mr. DANIELS: That is all I am offering, sir.

Examiner BAIN: Is there any objection?

Mr. DURBIN: We object to taking official notice of parts of that notice of hearing, and from Mr. Daniel's own argument, it is plain we must have the entire notice of hearing contained [20] in this record, not only of this one, but the following notices issued in connection therewith.

Examiner BAIN: Then you don't object to taking notice of the whole thing, but you do object to just part of it, is that correct?

Mr. DURBIN: That's correct. I intend to offer all of it.

Mr. DANIELS: All right. I will ask your Honor to take official notice of the entire hearing call.

Examiner BAIN: That is noticed.

Mr. DANIELS: I would ask you to take official notice of 21 FR 3799, the entire notice.

Examiner BAIN: That is the——

Mr. DANIELS: That is the first supplemental.

Examiner BAIN: Notice is taken thereof.

Mr. DANIELS: Federal Register 21 FR 6680, the second supplemental notice.

Examiner BAIN: That is officially noted.

Mr. DANIELS: 22 FR 1128. That, if your Honor please, if I am not mistaken, and I am sure I am not, is the supplemental notice amending—well, the notice to reconvene.

Examiner BAIN: Is there any objection to that?

Notice is taken of that.

Mr. DURBIN: As I understand it, that is the notice to reconvene issued by the Hearing Examiner, and you should take [21] official notice of it in its entirety.

Mr. DANIELS: Yes.

Then I would like to have you take official notice of 22 FR 1219. That is the supplemental call to which I have referred, wherein there was a very substantial change in the call and in the issues.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: Recommended decision found on 22 Federal Register 3318.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: The decision which appears in 22 FR 4194.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: And the order as finally promulgated and made effective 22 FR 4643.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: I should like you to take official notice of the publication of the Secretary of Agriculture as of February 23, 1956, 21 FR 1418.

Examiner BAIN: Is there any objection to that?

Notice is taken of that.

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[30] Examiner BAIN: Ordinarily I would say the whole record should become a part, but since we have a record of 16,000 pages, I believe it forms the exception.

I am going to rule that any part of the promulgation record, Docket AO-71AO-32, and Docket AO-284, any parts of that record mentioned in briefs of counsel to the parties are [31] officially noted for the purposes of the record in this 15-A proceeding. Also, any other parts of that record which the Examiner notifies counsel that he will use are officially noticed as part of this hearing. There probably won't be any, but there may be.

I can't limit the Judicial Officer, of course, but that is the ruling at this time.

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[46] Examiner Bain: Please come to order.

You may proceed, Colonel Daniels.

Mr. Daniels: Mr. Yohonic, please.

Whereupon, Rudolph P. Yohonic, was called as a witness for the Petitioner, and having been duly sworn, was examined and testified as follows:

Direct examination

By Mr. Daniels:

Q. Will you state your full name?

A. Rudolph P. Yohonic.

Q. And where do you live?

A. Magnolia Drive, Easton, Pennsylvania.

Q. Are you connected with Suncrest Farms, Inc., in any way?

A. I am. I am vice-president of Suncrest Farms, Inc.

Q. Are you also general manager?

A. Yes, sir.

Q. And Suncrest Farms is a corporation?

A. That is right.

Q. A Pennsylvania corporation?

A. That is right.

Q. Organized when?

[47] A. 1954. January 1, 1954, I believe is the date.

Q. December 16, 1953, if you don't mind my correcting you.

A. I stand corrected.

Q. And are Clifton Mowrer and yourself and Edward D. Glass the officers and directors of this corporation?

A. We are.

Q. What position does Mr. Mowrer hold?

A. He is president of the company.

Q. And Mr. Glass?

A. Secretary-treasurer.

Q. And you are a licensed milk dealer in the Commonwealth of Pennsylvania?

A. Yes, sir.

Q. You have been a licensed milk dealer since 1953?

A. Yes.

Q. And prior to that time the predecessor company was a licensed milk dealer?

A. Yes, since 1945.

Q. What type of milk business are you engaged in?

A. Fluid milk, primarily, as well as ice cream manufacturing.

Q. Does Suncrest Farms, Inc., manufacture ice cream?

A. They sell the ice cream.

Q. Yes, but that is not the corporation that manufactures [48] the ice cream?

A. No, sir.

Q. But they do sell it?

A. Yes, sir.

Q. Or rather, that corporation sells it, Suncrest Farms?

A. Yes, sir.

Q. Mr. Yohonic, in what geographic territory does Suncrest Farms, Inc., sell milk?

A. From the southern outskirts of Allentown through the Lehigh Valley, to include the communities or towns of Roseto and Bangor, including that same territory on the Jersey side which takes in Phillpsburg, primarily.

Q. For the towns that are more generally known to people, do you sell in the towns of Allentown, Bethlehem, Easton, and Phillipsburg?

A. That is right.

Q. Is the territory of those four towns continuously built up, one next to the other?

A. They are almost—they have separate names, but they tie in together, almost house by house.

Q. The only thing that separates Phillipsburg from Easton is what?

A. The Delaware River.

Q. About how long is the bridge across the Delaware River leading from one town to the other?

[49] A. About two city blocks, which is approximately a quarter of a mile at the outside.

Q. How long have you personally been acquainted with this territory?

A. Well, having lived in the central part of New Jersey I have known the territory for 35 years, and have lived in it 12 years.

Q. And you have operated in the milk business in it how long?

A. 12 years.

Q. Do the consumers or customers of Phillipsburg and Easton interchange in the buying of groceries and other commodities? Do they come back and forth?

A. It is almost a single community. They are constantly going across the bridge to shop in one another's towns.

Q. Is it known by you business men as a single commercial area?

A. Very much so.

Q. Now, when you go east of Phillipsburg what type of communities do you run into until you can get to the County of Orange?

Mr. DURBIN: I object. That is going into the area, and it has to be based upon the promulgation hearing, and not on evidence that is taken at this hearing.

Mr. DANIELS: I will withdraw the question for the moment.

[50] By Mr. DANIELS:

Q. How far east do you sell your milk?

A. To the outskirts of Phillipsburg.

Q. And how long have you sold milk in Phillipsburg?

A. Approximately 10 years.

Q. What percentage of the milk business done in Phillipsburg is done by dealers from the Pennsylvania side of the river?

Mr. DURBIN: I object. It is immaterial and irrelevant at this hearing. That is also included in the promulgation hearing.

Mr. DANIELS: I am not at all sure that it is in the 16,000 pages of testimony, therefore I wouldn't make a definite statement that it is or isn't. But I would say that one question about whether or not these provisions are void, or whether or not this dealer should be exempt—one of the things that would shed light on that is to show the nature of the business done there, because the compensatory payments provision if it stands on anything stands on the proposition that we can't come into a marketing area and separate prices, which I will come to in a few moments, and this will show what percentage is paid for at Pennsylvania Milk Control Commission prices, because all Pennsylvania dealers are under the Pennsylvania Milk Control prices.

Mr. DURBIN: I still say that the percentage he sells in [51] Phillipsburg may be relevant, but not what everybody else sells under the Pennsylvania Milk Control Commission.

Mr. DANIELS: I characterize compensatory payments as being a penalty. I do that because the Circuit Court of Appeals so stated, that that was a proper term to be applied to it, and I want to show the general condition here, and to show the general effect, and the overall effect of these compensatory payments provisions so far as Phillipsburg is concerned.

Mr. DURBIN: That wasn't the question you asked.

Examiner BAIN: Read the question.

(Reporter read the question.)

By Mr. DANIELS:

Q. I mean by that by dealers who have processing plants on the Pennsylvania side of the river.

Mr. DURBIN: It is still irrelevant. I think probably what he sells himself in Phillipsburg might be relevant.

Mr. DANIELS: I will be able to ask the next question. I have my question now. I know what I will ask.

Mr. DURBIN: I am objecting to that question because it

is irrelevant as to what other dealers in Pennsylvania are doing.

Mr. DANIELS: I think, sir, that is important for you to have before you in determining the applicability of this particular provision, and in determining whether it is a legal [52] one or not. The legality of this provision has not yet been ruled on.

Examiner BAIN: I am sorry, I don't see the relevancy. I think the legality of any provision on the whole has to be based entirely on the promulgation record.

Mr. DANIELS: I will note an exception.

Examiner BAIN: I will have to sustain the objection. I am not sure it is irrelevant, but I can't see the relevancy at this time.

Mr. DANIELS: I may come to it later.

By the way, on all adverse rulings—this one I didn't object to, but there is always an exception?

Examiner BAIN: Yes, there is an automatic exception.

By Mr. DANIELS:

Q. Mr. Yohonic, how many routes have you in Phillipsburg?

A. We have two and a half routes of our own, and we have a large sub-dealer, which represents about three and a half routes altogether of the amount of milk sold in that area.

Q. Now, Mr. Yohonic, I introduced in evidence this morning Pennsylvania Milk Control Commission Orders A-518, A-524, and A-544. Does your company pay to its producers for the milk sold both in Pennsylvania and in New Jersey the prices fixed by the Pennsylvania Milk Control Commission in its orders?

A. Yes, sir, we have.

[53] Q. What is the present Class I price that the milk Control Commission requires you to pay for milk sold in Pennsylvania and for milk sold in New Jersey?

Mr. DURBIN: Objection to that part of the question which is in New Jersey.

Mr. DANIELS: Well, that goes to the same objection you made this morning when I introduced the orders.

Mr. DURBIN: I say it does not show that price, or that that is why he has to pay that price.

Examiner BAIN: I think your objection protects the record. I think he may answer. Whatever is said about the law is not binding. The objection is overruled.

A. The present price for Class I milk set by the Milk Control Commission is $6.40 a hundredweight for four per cent milk. That is the price that we pay on that basis.

By Mr. DANIELS:

Q. Is that f.o.b. your plant?

A. Yes.

Q. And what is the butterfat differential between 3.5 milk and 4 per cent milk for each tenth of a point?

A. I think it is four cents; in Lehigh it is five cents. Pardon. It is six cents. That is right. It is hard to keep the orders straight. But it is six cents.

Q. So that you paid for 4 per cent milk $6.40 in September also?

[54] A. That is right. That is the September price. The August price was different.

Q. What was that?

A. $6 a hundredweight on the same basis.

Q. Now, what was the Class I-A price announced by the Market Administrator with the adjustment bringing it to the mileage zone in which your plant was located?

A. For the month of August, $5.94. It is $5.94116.

Q. How did you build it up to $5.94?

A. By allowing for the butterfat differential and transportation allowance, bringing it up to $5.94 plus.

Q. The announced 201-210-mile zone was $5.58?

A. Yes.

Q. And then you allowed four cents a point for the butterfat?

A. Yes, and 19.6 for transportation.

Q. What was it in September?

A. In September the Class I price as announced was $5.83. Allowing for the butterfat differential and transportation again, it brought the price up to $6.23626.

Q. Now, the milk that you sold in Phillipsburg, you paid in August on a four per cent basis f.o.b. your plant $6?

A. That is right.

Q. And in September $6.40?

[55] A. Yes.

Q. And in October it is also——

A. $6.40.

Q. What was the blend price which you returned to your producers in August on a four per cent basis f.o.b. your plant?

A. It was $5.5707.

Q. Wait a minute. Mr. Yohonic, will you look at the note and give it again.

A. The blend, four per cent for August was 5.7——

Q. Just read the dollars and cents.

A. $5.70.

Q. What was it in September?

A. $6.21.

Mr. DANIELS: Mr. Durbin, are you going to put the blend prices in for those two months?

Mr. DURBIN: I think you asked for those, and we can.

Mr. DANIELS: Well, maybe we have them.

I am not interested in them at the moment. You will put them in, if I want them?

Mr. DURBIN: Yes. I want to say they are announced for the 201-210 zone, then the handler has to make his own adjustment as provided in the order.

Mr. DANIELS: That is right.

By Mr. DANIELS:

Q. Will you tell me what products you sell in [56] Pennsylvania and Phillipsburg?

A. Well, we sell homogenized milk, Guernsey milk, pasteurized milk, cheese, cream, chocolate milk, butter—they are the dairy products.

Q. Fluid cream?

A. Yes.

Q. And cottage cheese?

A. That is right.

Q. Does your organization receive processed milk and manufactured cottage cheese?

A. Yes, we do.

Q. Now, these products you just mentioned you sell on both sides of the river, Pennsylvania and Phillipsburg, New Jersey, exactly the same?

A. We sell the cottage cheese at the same price, Mr. Daniels.

Q. I don't mean the prices. I mean, you don't have a different type of product?

A. No. The same products are sold in both areas.

• • • • •

[61] Q. Mr. Yohonic, in Phillipsburg how many competitors do you run into?

A. Are you speaking now of only those who operate in Phillipsburg, or all competitors in that area?

Q. I am talking about the competitors that cover the territory that you cover in New Jersey.

A. Seven.

Q. How many of them are New Jersey dealers?

A. Four.

Q. And is Lehigh Valley one of them?

A. That is right.

Q. That is Pennsylvania?

A. Pennsylvania.

• • • • •

[63] Q. I don't know whether I asked you or not, but the milk you sell in Northern New Jersey, in this marketing area, is packaged milk?

A. Oh, yes.

Q. Have you filed reports with the Market Administrator for Order 27 for the months of August and September?

A. Yes, we have, Mr. Daniels.

Q. Those reports show that you owed in compensatory payments how much? Give it to me by each month.

A. I haven't that figure, unfortunately. Have you got it, Mr. Glass?

Mr. DANIELS: Is it all right for Mr. Glass to talk to the witness?

Examiner BAIN: Yes.

Mr. DURBIN: Mr. Daniels, if this is from the reports, we intend to put the reports in evidence, and that would give those figures.

[64] Mr. DANIELS: Wouldn't it be orderly to have it here, and then you could clarify it by putting the report in?

Mr. DURBIN: Yes. I just wanted you to know that they are going in.

A. For the month of——

Mr. DURBIN: Just a minute. I want to object to his testifying unless you put that report in as an exhibit.

Mr. DANIELS: Well, of course, if your Honor please, I only have the copy. The government has the original, and I was informed they were going to put the original in. That is why I have not attempted to put the copy in.

Examiner BAIN: I think it is permissible for him to testify to that figure without putting the whole thing in. The objection is overruled.

A. For the month of August it amounted to $2,374.74. For the month of September it amounted to $2,336.66. Or a total of $4,711.40.

• • • • •

[67] Mr. DANIELS: Maybe we do have it.

Do you object if I show the witness the Market Administrator's release of October 14, 1957 and have him read the figures?

Mr. DURBIN: No. Why don't you put it in?

By Mr. DANIELS:

Q. I show you the immediate release of October 14, 1957 of the Market Administrator, and ask you how many producers he announced were in the pool?

A. 53,594.

Mr. DURBIN: For what month?

The WITNESS: September.

By Mr. DANIELS:

Q. Where are your producers located, Mr. Yohonic?

A. With the exception of two producers, they are all located in the State of Pennsylvania.

Q. How many producers have you?

Mr. DANIELS: While the witness is looking for that, I would like to say, Mr. Bain, that in response to your subpoena, which is no fault of yours, but served on us on Monday, we have brought all the information you requested, and it is available to the government. I don't know whether we have told you or not, but we have it here.

Mr. DURBIN: Thank you.

By Mr. DANIELS:

[68] Q. I will re-ask the question. How many producers have you?

A. We have 133 producers.

Q. Mr. Yohonic, are you constantly taking in more milk?

A. As our business has increased we have added farmers.

Q. And is your business increasing?

A. Yes.

Q. Mr. Yohonic, if this economic condition of paying $8 or $9 per hundredweight for Class I milk to sell in Phillipsburg would force you out of Phillipsburg, as you said it would, what percentage of your Class I business would you lose?

A. 4.35.

Q. And losing that business, Mr. Yohonic, would that increase or not increase your unit cost of the other 93.5?

A. It definitely would, because we are geared up, and you can't just stop, and you must continue the same unit operations that you have, and it would increase the cost as well as impose a hardship on the farmers, because there would be more surplus created.

Q. Now, Mr. Yohonic, I made a mistake in my mathematics. It was 95.5 that would be left, not 93.5. 4.5 from 100 would be 95.5.

• • • • •

[71] A. To my knowledge, and this is an estimate, of course, because I don't have access to the records of our competitors, I would say that the Pennsylvania dealers—and my knowledge is fairly thorough because of a flood situation in which we bottled and helped out many of them for a period of time, so we know quite a bit of the situation—but it could be safely said that the Pennsylvania dealers handle 80 per cent of the milk in the Phillipsburg area.

By Mr. DANIELS:

Q. How much do you handle in the way of hundredweight or quarts a day yourself in Phillipsburg?

A. In Phillipsburg, about 3500 pounds a day.

Q. Mr. Yohonic, the exact figures could be found by dividing the total amount that the Administrator said you owed by way of compensatory payments by the amount per hundredweight that you had to pay?

A. That is right. That would be in the record and easily obtainable.

• • • • •

[73] CROSS-EXAMINATION.

By Mr. DURBIN:

Q. Mr. Yohonic, did I understand you correctly that you are claiming that you are under a competitive disadvantage with other Pennsylvania dealers selling milk in Phillipsburg?

A. Not in Pennsylvania. I was speaking of the dealers [74] under Order 27 whom we compete against.

Q. Would you mind giving us the names of the four handlers, I believe you said, who are New Jersey handlers?

A. I think there were three—four were in Pennsylvania, if I am not wrong. I said four in Pennsylvania who were doing business in New Jersey, and the other three—there were seven all told. The three in New Jersey would be Garden State Farms, Port Murray, Fairview Dairy, and—I am sorry, there is another—Bush, of Flemington.

Q. Do you know whether or not those four handlers are under Order 27?

A. I couldn't say definitely, but I presume they would come under that. That encompasses their territory. I don't know that they are.

Q. Well, now, are those four the group that you claim that you are at a competitive disadvantage with?

A. Yes, under the present ruling that we fit in, they are the ones that we would be at a competitive disadvantage with.

Q. Now, Mr. Yohonic, is there anything that prevents you from being regulated in identically the same manner as those four handlers who are under Order 27?

A. Well, I don't know that there is. My understanding is you have to have a certain volume in order to be in. You can elect to become, but our past experience, due to a policy that [75] we have followed in trying to provide the best possible farm price to our farmers, we have maintained a high Class I u. .ization, and in the past, Mr. Durbin, that has always been much higher than Order 27. Had we been

in the situation we then would be jeopardizing—for the difference in payment we would be jeopardizing our milk supply with Pennsylvania dealers who are not under, and would be paying a higher price. It would serve two destructive purposes. One, it would reduce the farmer's pay; secondly, competitively we couldn't get our supplies.

Q. Now, considering that in making your choice of reporting to the Market Administrator for Order 27, you realize, do you not, that the order gives you an option of either paying compensatory payments or becoming a fully regulated handler? Isn't that correct?

Mr. DANIELS: I want to interpose just one objection to the form of the question. Mr. Durbin asked him a question inserting this phrase: "in making your choice." He didn't make a choice. He is filing his reports under a court order.

Mr. DURBIN: I realized that after I had thrown in that phrase, Colonel. But even under that condition that he is filing his reports under the order of the court, he still is entitled to exercise the option as to which way he will be regulated, and I am asking him if he does not have that option under the order.

[76] Mr. DANIELS: Of course, the order speaks for itself.

A. If we have, we have not elected it for the reasons I have stated. We were afraid our price would be so much lower, and it would jeopardize our supply, which of course would prove an irreparable damage to our business.

• • • • •

[78] By Mr. DURBIN:

Q. Mr. Yohonic, you testified that you had two producers who were not located in Pennsylvania.

A. That is right.

Q. Could you give us the location of those two producers?

[79] Are they on that list?

A. Yes, they are. One of them is Annandale, New Jersey—Robert Meyers. And Paul Scott, Phillipsburg, New Jersey.

Q. Now, are you under any regulation which provides for a market-wide pool?

A. Are we what?

Q. Are you under any regulation which provides for a market-wide pool?

A. Not to my knowledge.

Q. Then you make return to your producers on a blend of the use of the milk in your own plant, is that correct?

A. According to the Milk Control Commission of the State of Pennsylvania, that is correct—according to their rulings.

Q. Does the Pennsylvania Milk Control Commission set the price which is paid to the two producers that are located over in New Jersey?

A. They are paid on that regulation.

Mr. DANIELS: I will stipulate—since you are asking a legal question, I will stipulate that the Pennsylvania Milk Control Commission does not fix the price that they have to pay, but he has stated that he does.

• • • • •

REDIRECT EXAMINATION.

[81] Q. I think my last question had to do with the number of Pennsylvania dealers that you are in competition with, both from a selling and a buying standpoint, who do not do business in New Jersey.

A. I will read those dealers who we are in competition with in selling, and buying, too, but there are more buying than selling. Freeman's Dairy, Fegley's Dairy, Allentown Foremost Dairy, Northampton Sanitary Dairy, Norbeth Dairy, Slate Belt Dairy, Szep's Dairy, and Stocker Brothers Dairy—eight.

Q. Now, in buying, in addition to the ones that you have just mentioned which you are in competition with in selling, just what Pennsylvania dealers are you in competition with, if you know them? If you don't know them, give the territory.

A. The territory would encompass all of the Philadelphia dealers. They are all coming from the Philadelphia area and competing for the market. We have all the Reading dealers to the north of us who come into our area, and we are competing with them. And then, further north we have some Dairymen's League farmers. Now, those are the ones that I know, but to name the Philadelphia dealers, I just am not that familiar with them, but I could name quite a number.

Q. And when you say Philadelphia, you include suburban Philadelphia?

[82] A. I included suburban Philadelphia in the Philadelphia area.

Q. Now, Mr. Yohonic, from the buying angle you have to meet the blend prices paid by those dealers as fixed by the Pennsylvania Milk Control Commission rather than the Market Administrator's price fixed under Order 27?

A. Yes, and that is one of the reasons why we had to maintain a high Class I utilization in order to maintain price.

Q. And a high price?

A. That is right.

Mr. DANIELS: That is all.

Examiner BAIN: Is there any recross-examination?

RECROSS-EXAMINATION.

By Mr. DURBIN:

Q. Mr. Yohonic, do you have the butterfat test of the milk that you receive from producers?

A. Do I have it?

Q. Yes.

Mr. DURBIN: That is one of the things I asked for.

A. I can get it for you. Mr. Glass will give that to me if I may have a moment.

Mr. DANIELS: For what period of time?

Mr. DURBIN: August and September.

A. For the month of August it was 3.41. And for the [83] month of September it was 3.52.

By Mr. DURBIN:

Q. And I believe that you said that under the Pennsylvania Milk Control Board you have to pay on a four per cent basis?

A. That is right.

Mr. DURBIN: That is all.

Examiner BAIN: Are there any other questions?

Mr. DANIELS: I have no further questions.

(Witness excused.)

Mr. DANIELS: I would like to correct a question on the record. I stated what competition did Mr. Yohonic come in contact with in buying and selling by Pennsylvania dealers who do not do business in New Jersey. I meant by that Northern New Jersey as included in the marketing area.

May I ask you whether that is how you understood my question?

Mr. YOHONIC: That is the way I understood it.

• • • • •

[117] STEPHEN FRAHM, was called as a witness for the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DURBIN:

Q. Will you give your name and address?

A. Stephen Frahm, 30 Johnstone Road, Great Neck, Long Island. I am employed by the Market Administrator.

Q. Mr. Frahm, as an employee of the Market Administrator's Office, did you receive the original report from Suncrest Farms, Inc., for the month of August, 1957?

A. I did.

Examiner BAIN: That may be marked Exhibit 5 for [118] identification.

(The document above-referred to was marked Exhibit No. 5 for identification.)

Mr. DANIELS: May I ask counsel before he puts it in whether this is the report we filed, or whether this is the corrected one?

Mr. DURBIN: This is the one you filed, and I intend to follow it by the one that was corrected, in order to show the corrections. It is a photostat of the original.

Mr. DANIELS: I have no objection to this being put in without qualifications, and I have no objection to the photostat.

Examiner BAIN: Then it is admitted as Exhibit 5.

(The document above-referred to, previously marked Exhibit No. 5 for identification, was received in evidence.)

By Mr. DURBIN:

Q. Mr. Frahm, I show you the photostated copy of the report as corrected by you, and ask you if you made the corrections on that?

A. I did.

Q. Would you explain the reason for making those corrections?

Mr. DANIELS: And will you do it loud enough so that we can hear you?

A. The only corrections that are on here are to clarify the report on the butterfat differentials. They used five places—six places, and we used five. It changed nothing [119] as far as the value was concerned. And we also in-

serted the butterfat test on the front. That is the only changes on this report.

Mr. DANIELS: Did it make any difference on their liability?

Mr. DURBIN: No.

Exhibits 5 and 6 are for the month of August, 1957.

Examiner BAIN: Is there any objection to Exhibit 6?

Mr. DANIELS: I have no objection.

Examiner BAIN: Exhibit 6 is admitted.

(The document above-referred to was marked Exhibit No. 6 in evidence.)

Mr. DURBIN: Mr. Presiding Officer, I hand you the original report by Suncrest Farms, Inc., filed for the month of September, 1957, and ask that it be marked for identification.

Examiner BAIN: It may be marked Exhibit 7.

(The document above-referred to was marked Exhibit No. 7 for identification.)

Mr. DANIELS: No objection.

Examiner BAIN: Exhibit 7 is admitted.

(The document above-referred to, previously marked Exhibit No. 7 for identification, was received in evidence.)

Mr. DURBIN: We have also corrected this report for the month of September, and I would like to have this marked for identification.

Examiner BAIN: It may be marked Exhibit 8.

[120] (The document above-referred to was marked Exhibit No. 8 for identification.)

Mr. DANIELS: I am having the accountant check it. I doubt if we will have any objection.

Mr. DURBIN: Do you want Mr. Frahm to explain?

Mr. DANIELS: No. We have no objection to the correction.

Examiner BAIN: Exhibit 8 is admitted.

(The document above-referred to, previously marked Exhibit No. 8 for identification, was received in evidence.)

Mr. DURBIN: That is all of this witness. You may cross-examine.

CROSS-EXAMINATION.

By Mr. DANIELS:

Q. Will you state your official position?

A. Deputy chief accountant.

Q. Did you personally make these changes?

A. Yes, I did.

Q. And they are of no significance?

A. No significance whatsoever.

Q. The reports were found in what you would consider an exceedingly fine fashion?

A. Well, I won't go into that.

Q. Well, it was nicely done?

A. Very nicely done. Very nicely typed.

Mr. DANIELS: I have no further questions.

Mr. DURBIN: May we go off the record?

[121] Examiner BAIN: Yes. Off the record.

(Discussion off the record.)

Examiner BAIN: On the record.

Mr. DURBIN: If your Honor please, I hand you four copies of the billing from the Market Administrator based upon the reports submitted by Suncrest Farms, Inc., for the months of August and September, 1957, as corrected by Mr. Frahm, as he just testified.

Mr. DANIELS: I have no objection to Exhibit 9, and I might inform you that the money is lodged with the Registry of the United States District Court for the Eastern District of Pennsylvania.

Examiner BAIN: Exhibit 9 is admitted.

(The document above-referred to was marked Exhibit No. 9 in evidence.)

(Here follows 2 photolithographs, Exhibit 6 and 7)

• • • • •

## INSTRUCTIONS

**Schedule A**
After making the tabulations and determining the classifications pursuant to the provisions of the accounting Rules and Regulations issued by the Market Administrator, insert the required information on the upper part of the schedule so that classification will be reported for every product which moved from the plant during the month and every product which remained on hand at the end of the month. On the lower part of the schedule give the required information for opening inventories and receipts. Assign opening inventories and the various products received from all sources to classifications pursuant to the provisions of the Rules and Regulations. The quantities of opening inventories and receipts assigned to the various classes must be placed in the particular column which has the appropriate class heading. The total of opening inventories and receipts assigned in each class column should equal the total quantity placed in the same class column in the upper part of the schedule. If the totals do not agree, ascertain whether any source of milk or milk products has not been inserted. If it is found that all known sources have been inserted, place on the line for sources not established a quantity which will make the total receipts assigned in the lower half of the particular column equal the total quantity classified in the upper half of the same column.

Schedule B
In this schedule list in the detailed manner required all quantities disposed of as whole milk within the marketing area classified as Class I-A. Be sure that the figure shown as the total whole milk pounds is the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule A. If the pounds of bulk whole milk disposed of as reported on the bottom of this schedule is made up of sales and shipments of various types, for example, 40 quart cans, 20 quart cans, tank shipments, attach to the report a separate schedule showing the various quantities of each type and conversion to the pound figure. The conversion factors printed on this schedule are based upon applicable provisions of the Rules and Regulations. In the event that products leaving this plant in the various unit sizes are actually weighed and the specific weight recorded, such specific weights are to be inserted on each applicable line in lieu of the number of quarts.

Schedule C
In the event that any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II or skim subject to the fluid skim differential, the quantity so assigned must be inserted in this schedule. The amount of payment required by the marketing order provisions to be made with respect to quantities so assigned must be computed in this schedule. The rates to be used in such computation are specified in the applicable marketing order provision. The Class III credit at the bottom of Schedule C is computed at the applicable Class III price and applies only to the quantity of Class I-A and Class II milk or milk equivalent from known non-pool sources. Whereas this price will be applicable in the great majority of cases, there are some situations under which the credit rate is different. If the credit rate is different as provided by the marketing order provisions, use the credit rate applicable and attach a sheet showing the method used to compute that rate.

Form MA 4-8 Rev. 8-57 EXHIBI

Summerset Farms Inc
Pittstown Pa

(SEE INSTR

SCHEDULE B - CLASS I-A WHOLE MILK

| SIZE OF UNIT | SALES AND SHIPMENTS NO. OF UNITS | ADD CL INVENT NO. OF |
|---|---|---|
| ONE GALLON | | |
| HALF GALLON | 4,082 | |
| QUARTS - PAPER | | |
| QUARTS - GLASS | 31,725 | |
| PINTS - PAPER | 19 | |
| PINTS - GLASS | | |
| HALF PINTS | 535 | |
| THIRDS | | |
| OTHER PACKAGE UNITS | | |
| | | |
| | | |
| TOTAL QUARTS | | |
| POUNDS (MULTIPLY TOTAL QUARTS BY 2 | | |
| ADD- POUNDS IN OTHER SIZE UNI (ATTACH SEPARATE SHEET SHOWING NUMBER | | |
| TOTAL WHOLE MILK POUNDS (MUST EQUAL CLA | | |

3.4

SCHEDULE C

| MILK, BUTTERFAT OR SKIM MILK FROM OTHER THAN POOL SOURCES | | POUNDS OF MI MILK EQUIVAL OR SKIM MI |
|---|---|---|
| CLASS I-A | FROM KNOWN NON-POOL SOURCES | 86,539 |
| | FROM SOURCES NOT ESTABLISHED | |
| CLASS II | FROM KNOWN NON-POOL SOURCES | |
| | FROM SOURCES NOT ESTABLISHED | |

ns pursuant to the
he Market Administrator,
ule so that classifica-
lant during the month
th. On the lower part
ntories and receipts.
rom all sources to
gulations. The quanti-
es classes must be placed
ng. The total of opening
equal the total quantity
ule. If the totals do not
as not been inserted. If
n the line for sources not
gned in the lower half of
he upper half of the same

tities disposed of as
Be sure that the figure
f all whole milk quantities
ounds of bulk whole milk
up of sales and shipments
ank shipments, attach to
of each type and conversion
hedule are based upon
ent that products leaving
the specific weight recorded,
ne in lieu of the number of

than pool sources is
Class II or skim subject to
inserted in this schedule.
nts to be made with respect
The rates to be used in
er provision. The Class
licable Class III price and
milk equivalent from known
e great majority of cases,
rent. If the credit rate
e the credit rate applicable
e.

ombination of two separate

Form MA 4-8 Rev. 8-57 EXHIBIT 6

Summerset Farms Inc
Pittstown Pa

MARKET ADMINISTRATOR
NEW YORK-NEW JERSEY MILK MARKETING AREA
PLANT REPORT
For Month of August, 1957

(SEE INSTRUCTIONS ON BACK PAGE)

SCHEDULE B - CLASS I-A WHOLE MILK — ANALYSIS OF MILK DISPOSED OF WITHIN THE MARKETING AREA AS LISTED IN SCHEDULE A

| SIZE OF UNIT | SALES AND SHIPMENTS NO. OF UNITS | ADD CLOSING INVENTORIES NO. OF UNITS | DEDUCT OPENING INVENTORIES NO. OF UNITS | NET NO. OF UNITS | CONVERT TO QUART EQUIVALENT FACTOR | NUMBER OF QUARTS |
|---|---|---|---|---|---|---|
| ONE GALLON | | | | | X 4 | |
| HALF GALLON | 4,082 | | | 4,082 | X 2 | 8,164 |
| QUARTS - PAPER | | | | | → | |
| QUARTS - GLASS | 31,725 | | | 31,725 | → | 31,725 |
| PINTS - PAPER | 19 | | | 19 | ÷ 2 | 10 |
| PINTS - GLASS | | | | | ÷ 2 | |
| HALF PINTS | 535 | | | 535 | ÷ 4 | 134 |
| THIRDS | | | | | ÷ 3 | |
| OTHER PACKAGE UNITS | | | | | | |
| | | | | | | |
| | | | | | | |
| TOTAL QUARTS | | | | | | 40,033 |
| POUNDS (MULTIPLY TOTAL QUARTS BY 2.15) | | | | | | 86,072 |
| ADD- POUNDS IN OTHER SIZE UNITS - 40 QUART CANS, TANKS, ETC. (ATTACH SEPARATE SHEET SHOWING NUMBER OF EACH TYPE OF UNIT AND CONVERSION TO POUNDS) | | | | | | 468 |
| TOTAL WHOLE MILK POUNDS (MUST EQUAL CLASS I-A WHOLE MILK LISTED IN SCHEDULE A) | | | | | | 86,539 |

3.41 x 19% 6178 2,000 12,000

SCHEDULE C - COMPUTATION OF OBLIGATION

| MILK, BUTTERFAT OR SKIM MILK FROM OTHER THAN POOL SOURCES | | POUNDS OF MILK MILK EQUIVALENT OR SKIM MILK | Published Minimum Prices | Differentials: Butterfat + or − | Differentials: Transportation + or − | Total Class Prices | VALUE |
|---|---|---|---|---|---|---|---|
| CLASS I-A | FROM KNOWN NON-POOL SOURCES | 86,539 | $ 5.58 | $ -.034884 | $ +.196 | $ 5.741116 | $ 4,968.30 |
| | FROM SOURCES NOT ESTABLISHED | | | -.03488 | | 5.74112 | |
| CLASS II | FROM KNOWN NON-POOL SOURCES | | | | | | |
| | FROM SOURCES NOT ESTABLISHED | | | | | | |

## SCHEDULE A — SALES, SHIPMENTS AND CLASSIFICATION

Use one column for each class subdivis
Write in each column the Pounds of Milk OR the Pounds

| Give name of operator of Plant or other Establishment to which Milk or Milk Product was shipped (Other than in Route Sales) | Location of such Plant or other Establishment | Name of Product Sold or Shipped | Pounds of Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Milk Lbs. | Class I-B Milk Lbs. | Class III Heavy Cr. Lbs. | Class I Light C Lbs. |
|---|---|---|---|---|---|---|---|---|---|
| | 2 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
| Route Sales | Within Marketing Area | Milk | 86,539 | 3.41279 | | 86,539 | | | |
| | | Cream | | | | | | 26 | 2 |
| | | Other Products | [redacted] | [redacted] | | | | | |
| Route Sales | Outside Marketing Area | Milk | 1,618,938 | | | | 1,554,438 | | |
| | | Cream | | | | | | 852 | 13,7 |
| | | Other Products | [redacted] | [redacted] | | | | | |
| SALES AND SHIPMENTS TO OTHERS | | | | | | | | | |
| Farmer's Dairy | Philadelphia, Pa. | | | | | | 64,000 | | |
| TOTAL SALES AND SHIPMENTS | | | | | | 86,539 | 1,618,938 | 878 | 14,0 |
| ADD — Closing Inventories | | Milk | | | | | 117,782 | 943 | 3,1 |
| | | Cream | | | | | | | |
| | | Other Products | [redacted] | [redacted] | | | | | |
| TOTAL QUANTITIES SOLD, SHIPPED and ON HAND | | | | | | 86,539 | 1,736,720 | 1,821 | 17,1 |
| ADD — Plant Loss (Loss allowances based upon specific operations and receipts not otherwise accounted for) | | | | | | | | | |
| TOTAL CLASSIFICATION | | | | | | 86,539 | 1,736,720 | 1,821 | 17,1 |
| ASSIGNMENTS OF Opening Inventories AND RECEIPTS OF MILK AND MILK PRODUCTS TO CLASSIFICATIONS | | | | | | | | | |
| Opening Inventories | | Milk | | | | | 139,524 | | |
| | | Cream | | | | | | 717 | 2,0 |
| | | Other Products | [redacted] | [redacted] | | | | | |
| Receipts From Other Handlers, Other Plants or OTHER SOURCES Give NAME and LOCATION of each source | | Name of Product | Pounds | Butterfat Test | Pounds of Butterfat | | | | |

SSIFICATION

| Pounds of Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Milk Lbs. | Class I-B Milk Lbs. | Class III Heavy Cr. Lbs. | Class III Light Cr. Lbs. | Class III Half & Half Lbs. | Class | Skim Milk: Fluid Skim Differential Products (Code No. 92) | Skim Milk: Non Differential Disposition |
|---|---|---|---|---|---|---|---|---|---|---|
| 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 |
| 86,539 | 3.41279 | | 86,539 | | | | | | | |
| | | | | | 26 | 277 | | | | |
| [redacted] | [redacted] | | | | | | | | 3,739 | |
| 1,618,938 | | | | 1,554,438 | | | | | | |
| [redacted] | [redacted] | | | | 852 | 13,751 | 26 | | | 71,069 |
| | | | | 64,000 | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | | | | | | | | |
| | | | 86,539 | 1,618,938 | 878 | 14,028 | 26 | | 3,739 | 71,069 |
| | | | | 117,782 | 943 | 3,144 | | | | 5,746 |
| [redacted] | [redacted] | | | | | | | | | |
| | | | 86,539 | 1,736,720 | 1,821 | 17,172 | 26 | | 3,739 | 76,815 |
| | | | 86,539 | 1,736,720 | 1,821 | 17,172 | 26 | | 3,739 | 76,815 |

DUCTS TO CLASSIFICATIONS

| Pounds | Butterfat Test | Pounds of Butterfat | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| | | | | 139,524 | | | | | | |
| [redacted] | [redacted] | | | | 717 | 2,096 | | | | |
| | | | | | | | | | | 5,309 |

Use one column for each class subdivision — Write in the Class at the head of the column
Write in each column the Pounds of Milk OR the Pounds of Butterfat Classified (Do not include milk and butterfat in the same column)

Skim Milk

RECEIVED
OCT 16 11 AM 1957
MARKET ADMINISTRATOR
BY METROPOLITAN
MILK MARKETING AREA

RECD BY REGISTERED MAIL
MARKET ADMINISTRATOR
BY, MET. MILK MKTG. AREA

In this schedule list in the detailed manner required all quantities of whole milk disposed of within the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment the milk, milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule. The amount of payment required by the Marketing Order for such quantities of milk, butterfat or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

TIME OF FILING AND OF MAKING PAYMENT

If the operations of the plant covered by this report are such that milk or milk products are subject to payments under Secs. 927.83 and 927.84 this report should be filed in time to reach the office of the Market Administrator on or before the 10th of the month following the month for which this report is prepared. The obligation to the producer settlement fund computed on Schedule "C" must be paid on or before the 18th day of the month following the month for which this report is prepared. If the operations are such that there is no milk or milk product subject to payment under Secs. 927.83 or 927.84 this report should be filed on or before the 20th day of the month following the month for which this report is prepared.

Make checks payable to "Market Administrator."

Registered by _____ Date _____

## INSTRUCTIONS

### SCHEDULE A

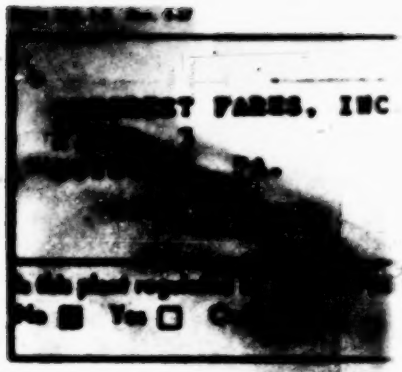
After making tabulations and determining the classifications pursuant to the provisions for accounting as set forth in the Rules and Regulations issued by the Market Administrator, show the required information on the upper part of the schedule. On the lower part of the schedule show the required information for opening inventories and receipts. Assign such opening inventories and receipts from all sources to the classification in the upper part of the schedule in accordance with the provisions of the Rules and Regulations. The total of each column on the line "TOTAL CLASSIFICATION" must equal the total of the same column on the line "TOTAL ASSIGNMENT."

### SCHEDULE B

In this schedule list in the detailed manner required all quantities of whole milk disposed of within the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

### SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment the milk milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule The amount of payment required by the Marketing Order for such quantities of milk, butterfat or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.




| SIZE OF UNIT |
| --- |
| One Gallon |
| Half Gallon |
| Quart—Paper |
| Quart—Glass |
| Pint—Paper |
| Pint—Glass |
| Half Pint |
| Third Quart |
| TOTAL QUART |
| POUNDS |
| POUNDS-REMA |
| TOTAL WHOL |

| SCHEDULE C—C | |
| --- | --- |
| NON POOL MILK AND MILK | |
| DESCRIPTION | |
| From known sou | |

| | | | |
|---|---|---|---|
| Quart—Glass | 29,590 | × 1 | 29,590 |
| Pint—Paper | 23 | ÷ 2 | 12 |
| Pint—Glass | | ÷ 2 | |
| Half Pint | 550 | ÷ 4 | 138 |
| Third Quart | | ÷ 3 | |
| TOTAL QUARTS | | | 37,526 |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 80,681 |
| POUNDS-REMAINING MILK (See instructions) | | | 387 |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule A) | | | 81,068 |

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETT

### NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TO CL PR |
|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 81,068 | $5.83 | + $.01026 | $ .196 | $6.[illegible] |
| | II | | | | | |
| LESS Credit | Sec. 927.83 | 81,068 | 3.172 | + .018981 | .06 | 3.2[illegible] |
| | | | | | Sub-total | |
| From sources not established | I-A | | | | | |
| | II | | | | | |
| | | | | | Sub-total | |

### NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING

| DESCRIPTION | | POUNDS OF SKIM | RATE | | TRANSPORTATION | |
|---|---|---|---|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 3,357 | 2.1[illegible] | | .196 | [illegible] |
| From sources not established | Not subject | | | | | |

TOTAL OBLIGATION (Payable on the 18th of the month following the month [illegible] this report is submitted)

This report properly signed must be submitted on or before the 18th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to

**MARKET ADMINISTRATOR**
**[illegible] East 42nd Street, New York 17, N. Y.**

the undersigned hereby certify that the in[illegible] is true and complete to the best of my know[illegible]

Handler's Name SUNCREST FAR[illegible]

Signed by Edward D. [illegible]
(Person authorized to sig[illegible]

Title Secretary-Treasurer Da[illegible]

ed as Class I-A. The figure shown as "TOTAL WHOLE MILK as the sum of all whole milk quantities listed as Class I-A on the f the figure shown for "POUNDS-REMAINING MILK" is made up of various sizes for example, 40 quart cans, 20 quart cans, tanks, and a tabulation showing for each size unit number of units and the total at any units of packaged milk leaving this plant are weighed and the are recorded the pounds should be included in the figure reported K." The total of the pounds shown in detail on the attached tabula- wn on Schedule "B" as "POUNDS-REMAINING MILK."

milk from other than pool sources is assigned pursuant to the Rules Class II, or skim subject to payment, the milk, milk equivalent of signed must be reported in this schedule The amount of payment der for such quantities of milk, butterfat, or skim milk must be com- applicable provisions of the Order which prescribe the rates for f the credit if applicable are set forth in Secs. 927.83 and 927.84.

OF FILING AND OF MAKING PAYMENT

overed by this report are such that milk or milk products are subject 83 and 927.84 this report should be filed in time to reach the office on or before the 10th of the month following the month for which bligation to the producer settlement fund computed on Schedule ore the 18th day of the month following the month for which this ations are such that there is no milk or milk product subject to pay- 27.84 this report should be filed on or before the 20th day of the which this report is prepared

checks payable to "Market Administrator."

Date

he provisions for account-
istrator show the required
he schedule show the re-
opening inventories and
schedule in accordance
umn on the line "TOTAL
'TOTAL ASSIGNMENT."

le milk disposed of within
'TOTAL WHOLE MILK
sted as Class I-A on the
NING MILK" is made up
, 20 quart cans, tanks, and
ber of units and the total
plant are weighed and the
led in the figure reported
il on the attached tabula-
INING MILK."

ned pursuant to the Rules
e milk, milk equivalent of
The amount of payment
or skim milk must be com-
n prescribe the rates for
ecs. 927.83 and 927.84.

NT

milk products are subject
n time to reach the office
wing the month for which
d computed on Schedule



[redacted] FARMS, INC. B-6-2

MARKET ADMINISTRATOR

NEW YORK-NEW JERSEY MILK MARKETING AREA

PLANT REPORT Ex 7

[redacted] under the Act?

For Month of September, 19 57.

SCHEDULE [redacted]

Analysis of whole [redacted]

| SIZE OF UNIT | SALES AND [redacted] NUMBER [redacted] | | [redacted] EQUIVALENT |
|---|---|---|---|
| One Gallon | | | |
| Half Gallon | [redacted] | | 7,786 |
| Quart—Paper | | | |
| Quart—Glass | 29,590 | × 1 | 29,590 |
| Pint—Paper | 23 | ÷ 2 | 12 |
| Pint—Glass | | ÷ 2 | |
| Half Pint | 550 | ÷ 4 | 138 |
| Third Quart | | ÷ 3 | |
| TOTAL QUARTS | | | 37,526 |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 80,681 |
| POUNDS-REMAINING MILK (See instructions) | | | 387 - 9 5-Gallon Cans |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule A) | | | 81,068 |

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 81,068 | $5.83 | + $.01026 | $ .196 | $6.03626 | $ 4,893.48 |
| | II | | | | | | |
| LESS Credit | Sec. 927.83 | 81,068 | 3.172 | + .018981 | .06 | 3.250981 | 2,635.51 |
| | | | | | Sub-total | | 2,257.97 |
| From sources not | I-A | | | | | | |

| | | | |
|---|---|---|---|
| Pint—Paper | 23 | ÷ 2 | 12 |
| Pint—Glass | | ÷ 2 | |
| Half Pint | 550 | ÷ 4 | 138 |
| Third Quart | | ÷ 3 | |
| **TOTAL QUARTS** | | | 37,526 |
| **POUNDS** (Multiply "Total Quarts" by 2.18) | | | 80,681 |
| **POUNDS-REMAINING MILK** (See instructions) | | | 387 - 9 5-Gallon Cans |
| **TOTAL WHOLE MILK POUNDS** (Must equal "Total Sales and Shipments" Class I-A Schedule A) | | | 81,068 |

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

**NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II**

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 81,068 | $5.83 | + $.01026 | $ .196 | $6.03026 | $ 4,893.48 |
| | II | | | | | | |
| LESS Credit | Sec 927.61 | 81,068 | 3.172 | + .018981 | .06 | 3.250981 | 2,635.51 |
| | | | | | Sub-total | | 2,257.97 |
| From sources not established | I-A | | | | | | |
| | II | | | | | | |
| | | | | | Sub-total | | |

**NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING**

| DESCRIPTION | | POUNDS OF SKIM | RATE | | TRANSPORTATION | | |
|---|---|---|---|---|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 3,357 | 2.1/P | [illegible] | .196 | [illegible] | 78.69 |
| From sources not established | Not subject | | | | | | |
| **TOTAL OBLIGATION** (Payable on the 8th of the month following the month for which this report is submitted) | | | | | | | $ 2,336.66 |

This report properly signed must be submitted on or before the 10th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to

**MARKET ADMINISTRATOR**
**[illegible] East 42nd Street, New York 17, N. Y.**

The undersigned hereby certify that the information given in this report is true and complete to the best of my knowledge information and belief.

Handler's Name SUNCREST FARMS, INC.

Signed by Edward D. Glass
(Person authorized to sign in behalf of handler)

Title Secretary-Treasurer Date 10/15/57

[128] ANSON J. POLLARD, was called as a witness for the Respondent, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DURBIN:

Q. Dr. Pollard, will you state your name and address and where you are employed?

A. Anson J. Pollard. I reside in South Norwalk, Connecticut, and I am employed by the New York Market Administrator in the capacity as Assistant Market Administrator, and by chance I am also Acting Market Administrator.

Q. Would you, at this time, state your qualifications?

Mr. DANIELS: I will admit his qualifications.

Mr. DURBIN: As an expert to make these calculations?

Mr. DANIELS: I will admit his qualifications as an expert to make calculations.

Mr. DURBIN: I would like to have him go ahead and spread those on this record, then we both have them.

Mr. DANIELS: Oh, if he wants to expand, I don't care.

A. I was graduated with a B.S. degree from Connecticut [129] State College, now the University of Connecticut, where I majored in animal husbandry and minored in agricultural economics. I took graduate work at the New York State College at Cornell University and the University of Vermont. At Vermont, I majored in milk marketing, and minored in statistics, and there obtained a master's degree. At Cornell I majored in milk marketing, and minored in prices, statistics and economic theory. I completed my work for a Ph.D. degree in the fall of 1940, and started work as an economist in the Market Administrator's Office in December, 1940. I continued in that capacity until 1945, when I became Chief of the Research and Information Section, and have held that position since.

ties of opening inventories and receipts assigned to the various classes
in the particular column which has the appropriate class heading. The total of opening inventories and receipts assigned in each class column should equal the total quantity placed in the same class column in the upper part of the schedule. If the totals do not agree, ascertain whether any source of milk or milk products has not been inserted. If it is found that all known sources have been inserted, place on the line for sources not established a quantity which will make the total receipts assigned in the lower half of the particular column equal the total quantity classified in the upper half of the same column.

Schedule B

In this schedule list in the detailed manner required all quantities disposed of as whole milk within the marketing area classified as Class I-A. Be sure that the figure shown as the total whole milk pounds is the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule A. If the pounds of bulk whole milk disposed of as reported on the bottom of this schedule is made up of sales and shipments of various types, for example, 40 quart cans, 20 quart cans, tank shipments, attach to the report a separate schedule showing the various quantities of each type and conversion to the pound figure. The conversion factors printed on this schedule are based upon applicable provisions of the Rules and Regulations. In the event that products leaving this plant in the various unit sizes are actually weighed and the specific weight recorded, such specific weights are to be inserted on each applicable line in lieu of the number of quarts.

Schedule C

In the event that any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II or skim subject to the fluid skim differential, the quantity so assigned must be inserted in this schedule. The amount of payment required by the marketing order provisions to be made with respect to quantities so assigned must be computed in this schedule. The rates to be used in such computation are specified in the applicable marketing order provision. The Class III credit at the bottom of Schedule C is computed at the applicable Class III price and applies only to the quantity of Class I-A and Class II milk or milk equivalent from known non-pool sources. Whereas this price will be applicable in the great majority of cases, there are some situations under which the credit rate is different. If the credit rate is different as provided by the marketing order provisions, use the credit rate applicable and attach a sheet showing the method used to compute that rate.

Note:- The rate for skim milk from sources not established is a combination of two separate calculations, one for skim milk subject to the fluid skim differential and the other for skim not subject to the differential. [See Sec. 927.84 (b)]

Time of Filing Report and of Making Payment

If the operations at the plant covered by this report are such that milk, butterfat or skim milk are assigned to Class I-A, Class II or skim subject to the fluid skim differential, this report must be filed on or before the 10th day of the month immediately following the month for which the report is prepared. The obligation, if any, computed in Schedule C must be paid on or before the 18th day of the same month in which this report is required to be submitted. If there is no assignment of products from other than pool sources to Class I-A, Class II or skim milk subject to the fluid skim differential, this report must be filed on or before the 20th day of the month immediately following the month covered by the report. This report properly prepared and signed must be submitted to the Market Administrator, 205 East 42 Street, New York 17, N. Y. Make checks payable to "Market Administrator."

| | | |
|---|---|---|
| ONE GALLON | | |
| HALF GALLON | 4,082 | |
| QUARTS - PAPER | | |
| QUARTS - GLASS | 31,725 | |
| PINTS - PAPER | 19 | |
| PINTS - GLASS | | |
| HALF PINTS | 539 | |
| THIRDS | | |
| OTHER PACKAGE UNITS | | |
| | | |
| | | |
| TOTAL QUARTS | | |
| POUNDS (MULTIPLY TOTAL QUARTS BY | | |
| ADD- POUNDS IN OTHER SIZE UNI (ATTACH SEPARATE SHEET SHOWING NUMBER | | |
| TOTAL WHOLE MILK POUNDS (MUST EQUAL CL | | |

3.4

SCHEDULE

| MILK, BUTTERFAT OR SKIM MILK FROM OTHER THAN POOL SOURCES | | POUNDS OF MILK EQUIV OR SKIM |
|---|---|---|
| CLASS I-A | FROM KNOWN NON-POOL SOURCES | 86,5 |
| | FROM SOURCES NOT ESTABLISHED | |
| CLASS II | FROM KNOWN NON-POOL SOURCES | |
| | FROM SOURCES NOT ESTABLISHED | |
| FLUID SKIM DIFFERENTIAL | FLUID SKIM & SKIM IN PRODUCTS | POUNDS OF |
| | FROM KNOWN NON-POOL SOURCES | 3,7 |
| | FROM SOURCES NOT ESTABLISHED | |
| TOTAL VALUE | | |
| CLASS III CREDIT (SEE INSTRUCTIONS) | | 86,5 |
| NET OBLIGATION - PAYABLE ON 18TH O | | |

THIS REPORT PROPERLY PREPARED AND SIGNED MUST

MARKET ADMINISTRATO
205 East 42nd Street, New York

ON OR BEFORE THE 10TH OF THE MONTH FOL
WHICH THE REPORT IS PREPARED IF PRODU

...e detailed manner required all quantities disposed of as ...ting area classified as Class I-A. Be sure that the figure ...lk pounds is the same as the sum of all whole milk quantities ...upper part of Schedule A. If the pounds of bulk whole milk ... the bottom of this schedule is made up of sales and shipments ...le, 40 quart cans, 20 quart cans, tank shipments, attach to ...ule showing the various quantities of each type and conversion ...onversion factors printed on this schedule are based upon ...e Rules and Regulations. In the event that products leaving ...it sizes are actually weighed and the specific weight recorded, ...o be inserted on each applicable line in lieu of the number of

... butterfat or skim milk from other than pool sources is ...les and Regulations to Class I-A, Class II or skim subject to ..., the quantity so assigned must be inserted in this schedule. ...red by the marketing order provisions to be made with respect ...ust be computed in this schedule. The rates to be used in ...fied in the applicable marketing order provision. The Class ... Schedule C is computed at the applicable Class III price and ...y of Class I-A and Class II milk or milk equivalent from known ... this price will be applicable in the great majority of cases, ...nder which the credit rate is different. If the credit rate ... the marketing order provisions, use the credit rate applicable ...the method used to compute that rate.

...from sources not established is a combination of two separate ...kim milk subject to the fluid skim differential and the other ... the differential. [See Sec. 927.84 (b)]

...e of Filing Report and of Making Payment

...ant covered by this report are such that milk, butterfat or skim ...I-A, Class II or skim subject to the fluid skim differential, ...n or before the 10th day of the month immediately following the ...is prepared. The obligation, if any, computed in Schedule C ...he 18th day of the same month in which this report is required ...is no assignment of products from other than pool sources to ... milk subject to the fluid skim differential, this report must ...0th day of the month immediately following the month covered by ...operly prepared and signed must be submitted to the Market ...Street, New York 17, N. Y. Make checks payable to "Market

| | | | | | | |
|---|---|---|---|---|---|---|
| PINTS - PAPER | 19 | | | 19 | ÷ 2 | 10 |
| PINTS - GLASS | | | | | ÷ 2 | |
| HALF PINTS | 535 | | | 535 | ÷ 4 | 134 |
| THIRDS | | | | | ÷ 3 | |
| OTHER PACKAGE UNITS | | | | | | |
| | | | | | | |
| | | | | | | |
| TOTAL QUARTS | | | | | | 40,033 |
| POUNDS (MULTIPLY TOTAL QUARTS BY 2.15) | | | | | | 86,071 |
| ADD- POUNDS IN OTHER SIZE UNITS - 40 QUART CANS, TANKS, ETC. (ATTACH SEPARATE SHEET SHOWING NUMBER OF EACH TYPE OF UNIT AND CONVERSION TO POUNDS) | | | | | | 468 |
| TOTAL WHOLE MILK POUNDS (MUST EQUAL CLASS I-A WHOLE MILK LISTED IN SCHEDULE A) | | | | | | 86,539 |

3.41 + 19%

61-78

SCHEDULE C - COMPUTATION OF OBLIGATION

| MILK, BUTTERFAT OR SKIM MILK FROM OTHER THAN POOL SOURCES | | POUNDS OF MILK, MILK EQUIVALENT OR SKIM MILK | Published Minimum Prices | Differentials: Butterfat + or — | Differentials: Transportation + or — | Total Class Prices | VALUE |
|---|---|---|---|---|---|---|---|
| CLASS I-A | FROM KNOWN NON-POOL SOURCES | 86,539 | $ 5.58 | $ -.034884 | $ +.196 | $ 5.741116 | $ 4,968.30 |
| | FROM SOURCES NOT ESTABLISHED | | | -.03488 | | 5.74112 | |
| CLASS II | FROM KNOWN NON-POOL SOURCES | | | | | | |
| | FROM SOURCES NOT ESTABLISHED | | | | | | |
| FLUID SKIM DIFFERENTIAL | FLUID SKIM & SKIM IN PRODUCTS | POUNDS OF SKIM | | | | | |
| | FROM KNOWN NON-POOL SOURCES | 3,730 | 1.874 | | +.196 | 2.07 | 77.21 |
| | FROM SOURCES NOT ESTABLISHED | | | | | | |
| TOTAL VALUE | | | | | | | $ 5,045.51 |
| CLASS III CREDIT (SEE INSTRUCTIONS) | | 86,539 | 3.089 | -.062792 | +.06 | 3.086208 | 2,670.77 |
| NET OBLIGATION - PAYABLE ON 18TH OF MONTH FOLLOWING MONTH REPORTED | | | | | | | $ 2,374.74 |

THIS REPORT PROPERLY PREPARED AND SIGNED MUST BE SUBMITTED TO:

MARKET ADMINISTRATOR
205 East 42nd Street, New York , N. Y.

ON OR BEFORE THE 10TH OF THE MONTH FOL... G THE MONTH FOR WHICH THE REPORT IS PREPARED IF PRODUC... ON OTHER THAN POOL SOURCES ARE ASSIGNED TO CLASS I-A OR ... II OR TO THE FLUID SKIM DIFFERENTIAL. OTHERWISE THE REP... UST BE SUBMITTED ON OR BEFORE THE 20TH OF SUCH MONTH.

I, the undersigned, hereby certify that the information given in this report, is true and complete to the best of my knowledge, information and belief.

Handler's Name SUNCREST FARMS, INC.

Signed by Edward D. Glass
(Person authorized to sign in behalf of handler)

Title Sec.-Treasurer Date 10/25/57

| | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| TOTAL SALES AND SHIPMENTS | | | | | 86,539 | 1,638,938 | 878 | 86,539 | 1,638,938 | 878 | 24,088 | 26 | | 3,730 | 71,069 |
| ADD — Closing Inventories | Milk | | | | | 117,782 | 943 | | 117,782 | 943 | 3,144 | | | | 5,746 |
| | Cream | | | | | | | | | | | | | | |
| | Other Products | [redacted] | [redacted] | | | | | | | | | | | | |
| TOTAL QUANTITIES SOLD, SHIPPED and ON HAND | | | | | 86,539 | 1,756,720 | 1,821 | 86,539 | 1,756,720 | 1,821 | 27,232 | 26 | | 3,730 | 76,815 |
| ADD — Plant Loss (Loss allowances based upon specific operations and receipts not otherwise accounted for) | | | | | | | | | | | | | | | |
| TOTAL CLASSIFICATION | | | | | 86,539 | 1,736,720 | 1,821 | 86,539 | 1,736,720 | 1,821 | 27,232 | 26 | | 3,730 | 76,815 |
| ASSIGNMENTS OF Opening Inventories AND RECEIPTS OF MILK AND MILK PRODUCTS TO CLASSIFICATIONS | | | | | | | | | | | | | | | |
| Opening Inventories | Milk | | | | | 199,524 | | | 199,524 | | | | | | |
| | Cream | | | | | | 717 | | | 717 | 2,096 | | | | 5,309 |
| | Other Products | [redacted] | [redacted] | | | | | | | | | | | | |
| Receipts From Other Handlers, Other Plants or OTHER SOURCES Give NAME and LOCATION of each source | Name of Product | Pounds | Butterfat Test | Pounds of Butterfat | | | | | | | | | | | |
| RECEIPTS FROM DAIRY FARMERS AND OWN FARMS | | 1,947,073 | | | 86,539 | 1,597,196 | 1,104 | 86,539 | 1,597,196 | 1,104 | 25,036 | 26 | | 3,730 | 71,506 |
| FROM SOURCES NOT ESTABLISHED | | | | | | | | | | | | | | | |
| TOTAL ASSIGNMENT (TOTAL POUNDS ASSIGNED FOR EACH CLASS COLUMN MUST EQUAL THE TOTAL CLASSIFICATION POUNDS ABOVE FOR THE SAME COLUMN) | | | | | 86,539 | 1,736,720 | 1,821 | 86,539 | 1,736,720 | 1,821 | 27,232 | 26 | | 3,730 | 76,815 |

RECEIVED
1956 MAY 11 PM 3
MARKET ADMINISTRATOR
NEW ENGLAND MILK MARKETING AREA
BOSTON 16, MASS.

SOLD BY REGISTERED MAIL
MARKET ADMINISTRATOR
NEW ENGLAND MILK MARKETING AREA
BOSTON 16, MASS.

In addition, in 1947, I became Assistant Market Administrator and was designated by the Secretary and Commissioner as the person to be made Acting Market Administrator in the absence of the Market Administrator, and I obtained the same designation from the director of the New York office of the milk industry in August, 1957. My duties have included working on any new program with which the office was involved and working with the Dairy Branch and the Division of Milk Control in the process of drafting amendments to the order.

In 1944 I was given a temporary appointment without pay as collaborator in the United States Department of Agriculture, and in such capacity was active in drafting the amendments which were put into effect in August, 1945. These included the [130] pool plant provisions.

I have also been actively engaged in drafting the accounting rules and regulations required by the amendment, and in meetings on desirable utilization which were required by an amendment to the order in 1946.

Q. Dr. Pollard, you said you completed your work for a Ph.D. Did you actually get your Ph.D.?

A. Yes. I got my Ph.D. officially in 1941, which was something like two months after I began working for the Market Administrator.

Mr. DURBIN: If your Honor please, I have the announced class prices for August, 1957, which I would like to have marked for identification.

Examiner BAIN: It may be marked Exhibit 10.

(The document above-referred to was marked Exhibit No. 10 for identification.)

Mr. DURBIN: I also have the announcement of the uniform price for August, 1957 by the Market Administrator for Order 27, and I would like to have it marked.

Examiner BAIN: It may be marked Exhibit 11.

(The document above-referred to was marked Exhibit No. 11 for identification.)

Mr. DURBIN: Also the release which goes with that announcement, which is a general explanation of the price announcement.

Examiner BAIN: It may be marked Exhibit 12.

[131] (The document above-referred to was marked Exhibit No. 12 for identification.)

By Mr. DURBIN:

Q. I would ask, Dr. Pollard, if these are the official announcements which are mailed out by the Office of the Market Administrator?

A. Those are the official announcements.

Mr. DURBIN: I ask that they be admitted in evidence for this record.

Examiner BAIN: Is there any objection?

Mr. DANIELS: I have no objection to Exhibits 10 and 11. I don't know what he is saying here yet. I——

Mr. DURBIN: Colonel Daniels, that is the only place in which the number of producers which you asked for earlier appear.

Mr. DANIELS: I have it in the record.

Mr. DURBIN: And ordinarily they are only included for statistical purposes.

Mr. DANIELS: If your Honor please, I have that in the record. Oh, well, it is editorial. If he wants to put it in, I have no objection.

Examiner BAIN: Exhibits 10, 11, and 12 are admitted.

(The documents above-referred to, previously marked Exhibits 10, 11, and 12 for identification, were received in evidence.)

Mr. DURBIN: Then I have these announcements of class prices by the Market Administrator for the month of September, 1957, [132] which I would like to have marked for identification.

Examiner BAIN: It may be marked Exhibit 13.

## CLASSIFICATION

SCHEDULE A

| | 2 | 3 | 4 | 5 | 6 | 7 | 8 | |
|---|---|---|---|---|---|---|---|---|
| ROUTE SALES | In the Marketing Area | Milk | 81,068 | | | 81,068 | | |
| | | Cream | 204 | | | | | |
| | | Other Products | | | | | | |
| ROUTE SALES | Outside the Marketing Area | Milk | 1,568,383 | | | | | 1,568 |
| | | Cream | 13,391 | | | | | |
| | | Other Products | | | | | | |
| SALES AND SHIPMENTS TO OTHERS | | | | | | | | |
| B & N Proc., Bottling & Mfg. Co. | Bethlehem, Pa. | Cream | | | | | | |
| Turner's Dairy | Philadelphia, Pa. | Milk | | | | | | 43 |
| Baker's Dairy | Hightstown, N.J. | Milk | | | | | | 21 |
| TOTAL SALES AND SHIPMENTS | | | | | | 81,068 | | 1,633 |
| ADD — CLOSING INVENTORIES | | Milk | | | | | | 152 |
| | | Cream | | | | | | |
| | | Other Products | | | | | | |
| TOTAL SALES, SHIPMENTS, and ON HAND | | | | | | 81,068 | | 1,785 |
| ADD — PLANT LOSS (appeal to the Rules and Regulations) | | | | | | | | |
| REMAINING QUANTITIES (the disposition of which has not been established) | | | | | | | | |
| TOTAL CLASSIFICATION | | | | | | 81,068 | | 1,785 |
| **ASSIGNMENTS** | | | | | | | | |
| OPENING INVENTORIES | | Milk | | | | | | 117 |
| | | Cream | | | | | | |
| | | Other Products | | | | | | |
| RECEIPTS FROM OTHERS | | Name of Product | | | | | | |

## SCHEDULE A

| | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | In the Marketing Area | Milk | 81,068 | | | 81,068 | | | | | | | |
| | | Cream | 204 | | | | | | 23 | 181 | | | |
| | | Other Products | | | | | | | | | | 3,357 | |
| | Outside the Marketing Area | Milk | 1,568,383 | | | | | 1,568,383 | | | | | |
| | | Cream | 13,391 | | | | | | 809 | 12,582 | 73 | | |
| | | Other Products | | | | | | | | | | | 74,209 |
| | Bethlehem, Pa. | Cream | | | | | | | | | | | |
| | Philadelphia, Pa. | Milk | | | | | | 43,000 | | | | | |
| | Hightstown, N.J. | Milk | | | | | | 21,[illegible] | | | | | |
| | | | | | | 81,068 | | 1,633,383 | 1,752 | 12,763 | 73 | 3,357 | 74,209 |
| | | Milk | | | | | | 152,196 | | | | | |
| | | Cream | | | | | | | 1,207 | 1,625 | | | |
| | | Other Products | | | | | | | | | | | 7,059 |
| | | | | | | 81,068 | | 1,785,579 | 2,959 | 14,388 | 73 | 3,357 | 81,268 |
| | | | | | | 81,068 | | 1,785,579 | 2,959 | 14,388 | 73 | 3,357 | 81,268 |
| | | Milk | | | | | | 117,792 | | | | | |
| | | Cream | | | | | | | 943 | 3,144 | | | |
| | | Other Products | | | | | | | | | | | 5,766 |
| | | Name of Product | | | | | | | | | | | |

(The document above-referred to was marked Exhibit No. 13 for identification.)

Mr. DURBIN: Also the announcement of the uniform prices for the month of September, 1957, by the Market Administrator.

Examiner BAIN: It may be marked Exhibit 14.

(The document above-referred to was marked Exhibit No. 14 for identification.)

Mr. DURBIN: And the same type of press release that went along with those announcements for the month of September.

Examiner BAIN: It may be marked Exhibit 15.

(The document above-referred to was marked Exhibit No. 15 for identification.)

Examiner BAIN: Is there any objection?

Mr. DANIELS: I would like to ask about the explanatory note on Exhibit 13. What does that mean?

The WITNESS: The orders require certain information to be announced on or before the 5th of the month. Our experience in computing the August prices resulted in the report going out on the 5th of the month, and handlers did not receive their class prices in some instances until three or four days later, which slowed up the process for them to file the reports. The one thing we are required to report that holds up the announcement is the average of prices at midwestern condenseries. So, in order to get the basic information out, which contains practically all, or does contain all that most handlers need, [133] we sent out the announcement on the 3rd of October showing the class prices and all of the quotations we had at that time. We did not have the prices of the midwestern condenseries, and we did not have them until October 7th, and at that time we sent them out.

Mr. DANIELS: You subsequently sent them out?

The WITNESS: Yes. This attachment was sent out Octo-

ber 7th, while the original class prices and all other statistics were sent out October 3rd.

Mr. DANIELS: Well, Dr. Pollard, the explanation you just gave me concerning the notation on Exhibit 13 did not apply to Exhibits 10, 11, and 12. Those were the class prices, uniform prices, and the explanation of Dr. Blanford for the month of August. There was no notation on those. So the notation you are now explaining only affects the September prices?

The WITNESS: That is right. This price list was put out on October 3rd. When it was sent out one figure was missing.

Mr. DANIELS: For September?

The WITNESS: For September. We sent it out as soon as we had it.

Mr. DANIELS: Would that figure change the class prices or the uniform prices?

The WITNESS: No, they don't change either. There is only one instance where this figure is required, and that is if [134] somebody were reporting milk more than 425 miles from New York on which a compensatory payment was required. This figure would be needed.

Mr. DANIELS: Do you mean this figure would be needed for compensatory payments only if the dealer owing the compensatory payments was located more than 425 miles from the market?

The WITNESS: No. If the plant at which that milk was received from producers was more than 425 miles from the——

Mr. DANIELS: That is what I mean. If the plant was located more than 425 miles from the market, and he was required to make compensatory payments, that figure would be required?

The WITNESS: That is right, except for one detail. In most cases the plant buying the milk rather than the plant operator would pay it.

Mr. DANIELS: And what is the figure that was not available October 3rd when this was sent out?

The WITNESS: It is the figure shown here, the average prices of midwestern condenseries, $3.096.

Mr. DANIELS: I have no objection.

Examiner BAIN: Then Exhibits 13, 14, and 15 are admitted.

(The documents above-referred to, previously marked Exhibit Nos. 13, 14, and 15 for identification, were received in evidence.)

[135] By Mr. DURBIN:

Q. Dr. Pollard, I believe you made certain calculations based on the figures which are stated in these exhibits. Will you go ahead and make that?

Mr. DURBIN: If your Honor please, I hand you a pool plant report for the month of August, 1957, as compiled by Dr. Pollard for Suncrest Farms, Inc., had they been a pool plant.

Mr. DANIELS: Now, I object to this as being immaterial and irrelevant.

Mr. DURBIN: I ask that it be marked for identification.

Mr. DANIELS: I withdraw the objection. I am sorry. I am anticipating.

Examiner BAIN: It may be marked Exhibit 16.

(The document above-referred to was marked Exhibit No. 16 for identification.)

Mr. DURBIN: I have the same type of report for Suncrest Farms for the month of September, 1957, and ask that it be marked for identification.

Examiner BAIN: It may be marked Exhibit No. 17.

(The document above-referred to was marked Exhibit No. 17 for identification.)

Mr. DANIELS: May we go off the record?

Examiner BAIN: Off the record.

(Discussion off the record.)

Examiner BAIN: On the record.

Mr. DANIELS: If he hasn't offered these in evidence yet, I [136] would like—have you offered them?

Mr. DURBIN: Not yet. I want Dr. Pollard to take these exhibits and explain what he has done.

By Mr. DURBIN:

Q. I hand you, Dr. Pollard, Exhibits 16, and 17, and ask you to explain those exhibits, and how you have made those calculations.

A. Exhibits 16 and 17—my explanation will be the same for each. The figures that were used as a basis for these, except where I otherwise will note, were the reports that were filed by Suncrest, and has been an exhibit here.

Mr. DANIELS: What is that again?

The WITNESS: These figures were taken from the reports that were filed with our office by Suncrest.

Mr. DANIELS: Okay.

A. (Continuing) I have not attempted to fill in these complete reports as it would be required to be filled in, but have merely filled in as best I could the front pages of the pool plant report. This is designed to show what the pool obligation of Suncrest would have been if they had elected, or had taken an option to be a pool plant.

The figures shown here for Class I-A and Class I-B are taken directly from the reports filed by Suncrest. The figure for Class III is the difference between those figures and the total milk received from farmers as shown by Suncrest.

[137] This report shows the basic price, the adjustment for butterfat, the adjustment for transportation differential at the plant, the total class prices, and the total value of the milk in each class at the respective class prices. Also computed in here are the adjustment specified by the order.

There is one estimate that I had to make, and that was an estimate of what should be shown in Schedule E, here

entitled "Location differentials," and more accurately described as the nearby differentials, which is the payment out of the pool which would go to individual farmers delivering to Suncrest if Suncrest were a pool plant.

I will explain how I made this estimate. We had in our office a list of producers with their addresses, which were submitted at the time of the referendum on the order.

Mr. DANIELS: You mean producers?

The WITNESS: Yes. The list was submitted to this office by Suncrest.

On the basis of that list I arrived at an approximate mileage location for each of the farms. Officially, locations are based on the location of the milk house of the producer. In this instance I did not have the location of the milk houses, but I have located the post offices which were used for their post office addresses. I have taken the nearby differentials as given in the order, weighted them by the number of producers in each of these zones as based on their post office addresses, [138] and arrived at a figure of 23.1 as being the expected average of the nearby differentials that would accrue to those producers. Thereby I have used that 23.1, multiplied it by the total pounds of milk received from producers to get the figure for the amount of nearby differentials which would be expected to be credited to the producers delivering to that plant.

As a result of these calculations, we computed what the pool debit or pool credit—I had this computed for me by the office—what the pool debit or credit would have been by Suncrest Farms, Inc., had they been a fully regulated pool plant.

Mr. DANIELS: Now, Dr. Pollard, and this is all my own fault, but as many years as I have practiced law, which is 31, this debit and credit of you accountants always confuses me. Will you translate that and tell me what we would have owed the pool?

The WITNESS: Mr. Daniels, I am not an accountant either, but debit means a payment by the handler to the pool.

I arrived at some net figures. For August the payment

to the pool if the plant had been a fully regulated pool plant would have been $6,884.93. And in September, 1957, the payment to the pool by the handler would have been $5,555.38.

Examiner BAIN: Will you show me where that figure is on the August report?

The WITNESS: Those figures do not show on these reports. [139] These reports are reports that the handler would file before anyone knew what the uniform price would be. These figures that I have read in are the result of multiplying the total pounds of milk by the basic uniform price, and comparing this result with the total net pool obligation as finally shown here. If the net pool obligation is higher than the value of the milk at the uniform price, it results in a payment into the pool, and that is what happened in this case, or what would have happened.

By Mr. DURBIN:

Q. Had the Suncrest Farms, Inc., been a pool plant, their payments into the pool would have been greater than their payments were having elected to make compensatory payments, isn't that correct?

A. That is correct.

Mr. DANIELS: I could have told you that.

Mr. DURBIN: That is all. You may cross-examine.

CROSS-EXAMINATION.

By Mr. DANIELS:

Q. The uniform price that would have been paid the shippers of Suncrest, ignoring the location differential or nearby differential, would have been what for the month of August? The uniform price paid to producers had Suncrest been a pool plant.

A. I have the September announcement before me.

[140] Q. I want the August.

A. The August uniform price——

Q. Keep September, too.

A. —was $4.68 as a basic price. That is in the 201-210-mile zone. In addition to that, the producers at the Suncrest plant at Butztown, Pennsylvania, would have been entitled to a transportation differential of 19.6 cents. They would have been entitled to a direct delivery differential of 10 cents. Those are the two differentials in addition to the nearby differential which I have estimated to be 23.1 cents.

Q. Just a minute. You didn't estimate it would be 23.1 cents. I understood 23.1 per cent.

A. No. No. I estimated that the nearby, the average nearby differential for farmers of Suncrest would be 23.1 cents.

Q. All right. If it appears in the record that you used per cent, do you want it to be cents?

A. Yes.

Q. And you are averaging that overall, including Suncrest?

A. Yes.

Q. That 23.1 would apply to all? That is an average?

A. That is an average. That was my estimate.

Q. What did Suncrest actually pay?

A. That I don't know.

Q. Well, it is in the record.

[141] Dr. Pollard, it was testified by Mr. Yohonic—I suppose you will accept the figure—he had paid $5.70 f.o.b. his plant for 4 per cent milk. You will accept that figure?

A. Yes, I will accept that.

Q. Now, your figure would have returned to his producers for 3.5 milk $5.20, would it not?

A. If my figure is correct, the uniform price average at that plant, adding together all the figures I have given, would have been $5.207.

Q. And that is exactly the price for 3.5 milk. What would it be for 4 per cent milk? Your differential was 5.8 cents?

A. I think that is correct.

Q. So you would multiply that by 5?

A. That is correct.

Mr. DURBIN: I object to that. I don't think that is calculated, because they did not receive 4 per cent milk from the producers.

Mr. DANIELS: Well, I will ask Dr. Pollard.

A. If we had a producer who delivered 4 per cent milk, that is what it would have been. I might say, to the best of our information, at these plants the milk tested very close to 3.5 per cent.

By Mr. DANIELS:

[142] Q. All right. Now then, if Suncrest had paid $5.70, and for 4 per cent milk at .6 per point for butterfat, they would have paid $5.407 for 3.5 milk at their plant, is that correct?

A. Assuming your figures are right, that is right.

Q. All right. So that we come to this conclusion for the month of August, do we not, Dr. Pollard, that Suncrest would have paid—if it had been a pool plant, it would have cost their treasury $4.50 a hundredweight and $10 more in the month of August than if they had paid compensatory payments?

A. That is a little fast for me on that one.

Q. Well, you have the bills here. In the month of August we owed $2374, did we not?

A. That is right.

Q. If I subtracted that from what you said our pool obligation would have been, I would get $4510, would I not?

A. Yes, that is right.

Q. Now, that is what it would have cost our company, isn't it, more to be a pool plant than to be a compensatory payment plant?

A. If you continued to pay the producers the same price you would otherwise have paid them.

Q. Yes. And our producers would receive 20 cents a hundredweight—20 to 21 cents a hundredweight less if we were [143] a pool plant than if we had operated as a compensatory payment plant—21 cents a hundredweight less?

A. I don't think that necessarily follows.

Q. Well, Dr. Pollard, they would only have gotten $5.207 under the Administrator.

A. That is the minimum.

Q. Well, yes, I am talking about the ordinary prices paid by the order. They did get $5.407, so they would have gotten 20 cents less, would they not—20 cents a hundredweight less?

A. If they got paid only the minimum uniform price, that is correct.

Q. Yes. Well, that is what I am talking about.

Now, let's run through the calculation for September. You say our debit, or the amount we owed to the pool would be $5555, is that right? I am dropping the pennies. Am I correct in that statement?

A. That is right.

Q. And our obligation to the pool as to compensatory payments would have been $2336?

A. Yes, that is right.

Q. So the difference would have been whatever that comes to—I have it here some place—$3219. Is that so?

A. That is right.

Q. That is how much more it would have cost us to be a [144] pool plant than a compensatory payment plant?

A. That is right.

Q. Now then, what was the uniform price for September?

A. The basic price was $5.03.

Q. $5.03. Now, will you bring the adjustment up again.

A. If my arithmetic is correct, that would give a price for 3.5 milk on the average of $5.5710.

Q. Will you give me the figures how you started with that? Starting with what?

A. $5.03. Everything else is the same.

Q. Then you added the transportation differential, 19.6, and 10, and 23.1? Let's check your arithmetic.

A. $5.557, yes.

Q. You will accept Mr. Yohonic's statement that they paid $6.21 to their producers for 4 per cent milk? That is,

if we accept the premise that it was established in the records?

A. That is the 4 per cent price.

Q. Yes. And if you reduce that to 3.5 at 6 cents a point, you get $6.21?

A. Yes.

Q. So our producers for the month of September would have received 35.3 cents a hundredweight less?

A. That would be the uniform minimum price at that plant—35.3 cents less than what you said you paid them.

Mr. DANIELS: Dr. Pollard, I haven't anything more, and I [145] have no objection to your putting these in the record. In fact, if you don't maybe I will offer it.

REDIRECT EXAMINATION.

By Mr. DURBIN:

Q. I think it is pretty evident that Suncrest Farms, Inc., exercised the option in a manner most favorable to them, is that correct?

Mr. DANIELS: Just a minute. I do not think it is proper to ask the witness why anybody exercised an option. The facts of the two situations are in the record, and the Hearing Officer will draw the conclusion. I do not think it is relevant to ask why we did it, and we didn't exercise an option. I do object to that.

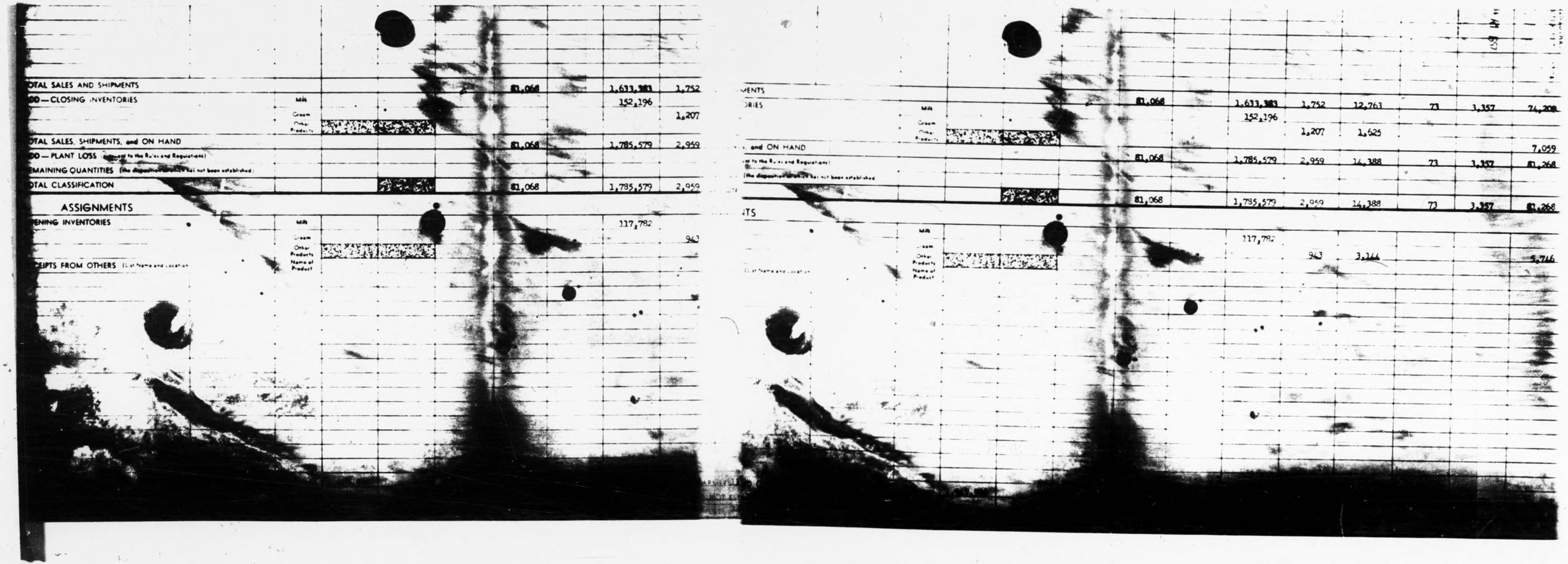
Mr. DURBIN: All right. I will withdraw it.

Examiner BAIN: Exhibits 16 and 17 are admitted.

(The documents above-referred to, previously marked Exhibits 16 and 17 for identification, were received in evidence.)

Mr. DURBIN: Now, we would like to have that list of producers.

Mr. DANIELS: Now, sir, I don't think the list of producers is relevant or material, or that it is needed, inasmuch as Dr.



| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| TOTAL SALES AND SHIPMENTS | | | | 81,068 | 1,633,383 | 1,752 | 12,763 | 73 |
| 00 — CLOSING INVENTORIES | Milk | | | | 152,196 | | | |
| | Cream | | | | | 1,207 | 1,625 | |
| | Other Products | | | | | | | |
| TOTAL SALES, SHIPMENTS, and ON HAND | | | | 81,068 | 1,785,579 | 2,959 | 14,388 | 73 |
| 00 — PLANT LOSS (allowed by the Rules and Regulations) | | | | | | | | |
| EMAINING QUANTITIES (the disposition of which has not been established) | | | | | | | | |
| TOTAL CLASSIFICATION | | | | 81,068 | 1,785,579 | 2,959 | 14,388 | 73 |
| ASSIGNMENTS | | | | | | | | |
| ENING INVENTORIES | Milk | | | | 117,782 | | | |
| | Cream | | | | | 943 | 3,144 | |
| | Other Products Name of Product | | | | | | | |
| EIPTS FROM OTHERS (List Name and Location | | | | | | | | |

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| ...MENTS | | | | | | | | |
| ...ORIES | Milk | | | 81,068 | 1,633,383 | 1,752 | 12,763 | 73 |
| | Cream | | | | 152,196 | | | |
| | Other Products | | | | | 1,207 | 1,625 | |
| ... and ON HAND | | | | | | | | |
| ...t to the Rules and Regulations) | | | | 81,068 | 1,785,579 | 2,959 | 14,388 | 73 |
| ...(the disposition of which has not been established | | | | | | | | |
| ...NTS | | | | 81,068 | 1,785,579 | 2,959 | 14,388 | 73 |
| | Milk | | | | | | | |
| | Cream | | | | 117,782 | | | |
| | Other Products Name of Product | | | | | 943 | 3,144 | |
| | (List Name and Location | | | | | | | |

Pollard said he already has them, and he made his calculations from the list.

Mr. DURBIN: He has them for the month of March The list was submitted as of the month of March.

[146] Mr. DANIELS: Mr. Durbin, or Dr. Pollard, do you have the list of these producers?

The WITNESS: I don't have that list. I have a list of producers that was submitted for the month of March.

Mr. DANIELS: Well, you have a list of producers submitted to you by Suncrest?

The WITNESS: That is right.

Mr. DANIELS: Then take this (handing the document to Mr. Durbin).

Examiner BAIN: Is there anything further?

Mr. DANIELS: I would say this. Of course, he hasn't offered it yet. What do you want to do with them?

Mr. DURBIN: I want to make them an exhibit in this record to show the zones. We have it on this photostated copy for March, but this list will bring it down to date where you can pinpoint it more exactly.

Mr. DANIELS: Mr. Hearing Officer, if you want to use this list for the purpose of this hearing only, I will obey the subpoena and give them to him. But I am only giving them to him for the use of this hearing, and that is the limit.

Examiner BAIN: The calculations in Schedule E of Exhibit 17 were calculated upon the producers as they were in March?

The WITNESS: That is correct.

Examiner BAIN: And the only difference in the producers as of October and March would be that maybe some of them have [147] quit, and maybe new ones have been obtained, is that the only difference?

The WITNESS: There are two things that might affect the average. One thing is the producers, and the second is the volume of milk by the producers, and the location of the milk house as distinguished from the post office address.

Mr. DANIELS: But you see, sir, he couldn't make that

calculation for this hearing, so what is the good of the list going in?

Examiner BAIN: I don't see that the list is necessary. A change in producers in six or seven months, unless there is an earthquake or something, I suppose would be pretty small.

Mr. DANIELS: I can put a witness on to say that we only changed three producers.

Mr. DURBIN: Well, I have a list from March on which we have calculated the zones, and I would like to offer this in evidence at this time.

Mr. DANIELS: No objection.

Examiner BAIN: Do you think that adds anything to the proof of being a pool plant would cost more than a compensatory payment plant? If that is all it is for——

Mr. DANIELS: Then I will object to it. It doesn't add anything, and clutters up the record. I don't think it is necessary.

Examiner BAIN: I don't see that it is necessary, but if [148] you want it in I think it should be admitted.

Mr. DANIELS: All right.

Examiner BAIN: It will be admitted as Exhibit 18.

(The document above-referred to was marked Exhibit No. 18 in evidence.)

Examiner BAIN: Is that all of Dr. Pollard?

Mr. DURBIN: Yes.

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REVIEW PROCEEDINGS RE SUNCREST
RUDOLPH P. YOHONIC—CROSS

[151] RUDOLPH P. YOHONIC, recalled as a witness by the Petitioner, and having been first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION.

By Mr. DURBIN:

Q. Mr. Yohonic, does the plant of the Sunerest Farms, Inc., have health approval to ship into the marketing area as now defined under Order No. 27?

A. We have a New Jersey health approval, yes, sir.

Q. Is that from the State of New Jersey, or is it from some local health authority?

A. No, sir, it's from the State of New Jersey.

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REVIEW PROCEEDINGS RE LEHIGH VALLEY
REQUEST FOR OFFICIAL NOTICE

[37] Mr. DANIELS: I would ask your Honor to take judicial notice of 21 FR 3537, in so far as it relates to the proposed extended territory appearing in the proposal of United, in so far as it relates to territory, suggested territory made by the government committee of Northern New Jersey, United Milk Producers of New Jersey, and Eastern Milk Producers Cooperative Association of Northern New Jersey.

Examiner BAIN: Is that the original notice of the promulgation hearing of May 18th?

[38] Mr. DANIELS: Yes, sir.

Examiner BAIN: Do you want to offer just part of that?

Mr. DANIELS: That is all I am offering, sir.

Examiner BAIN: Is there any objection?

Mr. DURBIN: We object to taking official notice of parts of that notice of hearing, and from Mr. Daniels' own argument, it is plain we must have the entire notice of hearing contained in this record, not only of this one, but the following notices issued in connection therewith.

Examiner BAIN: Then you don't object to taking notice

of the whole thing, but you do object to just part of it, is that correct?

Mr. DURBIN: That's correct. I intend to offer all of it.

Mr. DANIELS: All right. I will ask your Honor to take official notice of the entire hearing call.

Examiner BAIN: That is noticed.

Mr. DANIELS: I would ask you to take official notice of 21 FR 3799, the entire notice.

Examiner BAIN: That is the——

Mr. DANIELS: That is the first supplemental.

Examiner BAIN: Notice is taken thereof.

Mr. DANIELS: Federal Register 21 FR 6680, the second supplemental notice.

Examiner BAIN: That is officially noted.

[39] Mr. DANIELS: 22 FR 1128. That, if your Honor please, if I am not mistaken, and I am sure I am not, is the supplemental notice amending—well, the notice to reconvene.

Examiner BAIN: Is there any objection to that?

Notice is taken of that.

Mr. DURBIN: As I understand it, that is the notice to reconvene issued by the Hearing Examiner, and you should take official notice of it in its entirety.

Mr. DANIELS: Yes.

Then I would like to have you take official notice of 22 FR 1219. That is the supplemental call to which I have referred, wherein there was a very substantial change in the call and in the issues.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: Recommended decision found on 22 Federal Register 3318.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: The decision which appears in 22 FR 4194.

Examiner BAIN: Notice is taken of that.

Mr. DANIELS: And the order as finally promulgated and made effective 22 FR 4643.

Examiner BAIN: Notice is taken of that.

REVIEW PROCEEDINGS RE LEHIGH VALLEY

RULING ON OFFICIAL NOTICE

Mr. DANIELS: I should like you to take official notice of the publication of the Secretary of Agriculture as of February 23, 1956, 21 FR 1418.

[40] Examiner BAIN: Is there any objection to that?

Notice is taken of that.

I might save a little time here. Are we going to get the entire promulgation record?

Mr. DANIELS: I am not offering it.

Mr. DURBIN: I intend to offer the entire promulgation record upon which these various documents were issued.

Examiner BAIN: Is there any objection to that, Colonel Daniels?

Mr. DANIELS: Yes, sir.

Examiner BAIN: You had better go ahead with yours then.

Mr. DANIELS: Mr. Hearing Officer, the promulgation record—I am not sure whether or not it includes the February 23, 1956 letter of the Secretary which is referred to in the original call, and that is the one I just offered as 21 FR 1418.

Examiner BAIN: Yes. That will be noted whether or not it is formally a part of that.

Mr. DANIELS: You mean you will take official notice?

Examiner BAIN: Yes, I will take official notice whether or not it is.

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RULING ON OFFICIAL NOTICE

[49] Examiner B[illegible]: Ordinarily I would say the whole record should become a part, but since we have a record of 16,000 pages, I believe it forms the exception.

I am going to rule that any part of the promulgation record, Docket AO-71, AO-32, and Docket AO-284, any parts of that record mentioned in briefs of counsel to the parties are officially noted for the purposes of the record in this 15-A proceeding. Also, any other parts of

that record which the Examiner notifies counsel that he will use are officially noticed as part of this hearing. There probably won't be any, but there may be.

I can't limit the Judicial Officer, of course, but that is the ruling at this time.

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[64] GLENN A. BOGER, was called as a witness for the Petitioner, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DANIELS:

Q. Mr. Boger, will you state your full name, please?

A. Glenn A. Boger.

Q. And where do you live?

A. R. D. 2, Allentown, Pennsylvania.

Q. And what is your business?

A. I am primarily in the milk business.

Q. In what capacity, and with what concern?

A. President and general manager of Lehigh Valley Cooperative Farmers.

Q. Mr. Boger, do you also hold a quasi-governmental position?

A. I am a member of the Federal Farm Credit Board, in Washington.

Q. Appointed by whom?

A. Appointed by the President.

Q. And you are an official of any cooperative organization, association, or federation?

A. I am vice-president, first vice-president of the [65] National Council of Farmer Cooperatives, and I am also on the board of directors of the National Milk Producers Federation.

Q. Are you connected with any banking institution?

A. Chairman of the Board of the First National Bank of Allentown.

Q. Now, Mr. Boger, how long have you been connected with the Lehigh Valley Cooperative?

A. 24 years.

Q. And how long have you been president and general manager?

A. 24 years.

Q. In your various capacities that you have just discussed, are you acquainted with the classification of Phillipsburg, Allentown, Bethlehem, and Easton by the Census Bureau, and also by the Federal Reserve Bank?

Mr. DURBIN: I object.

Examiner BAIN: It seems to be cumulative, but I think the objection is overruled.

Mr. DURBIN: It goes to the area.

A. Allentown, Bethlehem, and Easton, and Phillipsburg, in Warren County, have always been considered as the metropolitan area in the reports of the Census Bureau, the Federal Reserve Bank, and the United States Department of Labor. All three of these government institutions have always [66] classified it as one metropolitan area.

By Mr. DANIELS:

Q. Mr. Boger, do you sell milk in Phillipsburg—your company?

A. Yes, sir.

Q. About how much milk do you sell a day?

A. At the present time it is around 8,000 quarts a day.

Q. Were you in the room when Mr. Yohonic testified?

A. I was.

Q. Did you hear him estimate the amount of business done in Phillipsburg by Pennsylvania dealers as opposed to the amount done by New Jersey dealers?

A. Yes, I heard this statement.

Q. Do you agree with that?

A. I agree with it, yes, sir.

Q. Mr. Boger, could Suncrest Farms, Inc., or could you, or any other Pennsylvania dealer, get the supply of milk that you need if you or Suncrest Farms, Inc., would pay the Market Administrator's blend price under Order 27 while your competitors were paying blend prices established by the class prices of the Pennsylvania Milk Control Commission?

A. I think either one of us would get very much milk from farmers under those conditions.

Q. You have had experience in bottling and packaging and selling milk?

A. Yes.

[67] Q. In your opinion, could Suncrest Farms, Inc., continue to sell milk in Phillipsburg if they are required to pay $8 plus to $9 plus per hundredweight for their Class I milk in competition with dealers who buy it under the Class I-A price of Order 27?

A. Well, I think if they did it very long they would go broke.

Q. The six cents or five and a half cents more a quart they would have to pay is, of course, a very substantial loss on every quart?

A. Well, it is a severe penalty for doing business in that area.

Q. And to be required to do that, their only choice, their only alternative would be to leave the area?

A. That is right.

Q. Once a company has left an area and then later it is determined that there would be an equalization, can they just go right back and pick up their business or not?

A. No, definitely not, not with competition as keen as it is at this time.

Q. Do you compete with Suncrest Farms, Inc., in Phillipsburg?

A. Yes.

Q. And in Allentown?

A. Yes.

[68] Q. And in Bethlehem?

A. Yes.

Q. And in Easton?

A. Yes.

Q. Do you find their price structure to comply with the prices paid by the regulatory agency of New Jersey and the regulatory agency fixed in Pennsylvania for the milk they sell?

A. Yes.

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GOVERNMENT'S OFFER OF EVIDENCE

[74] Mr. DURBIN: If you want me to repeat it all over again, [75] all right.

I would like to offer in evidence the record involving the compensatory payment provisions contained in Docket No. AO-71-A-24; and also to offer the notice of hearing under said docket number appearing in 18 Federal Register, page 256; the recommended decision based upon that record, 18 Federal Register 5595; the decision based upon that record appearing in 18 Federal Register 8444; and the amended order appearing in—let me make that clearer: the order amending Order 27 appearing in 19 Federal Register at page 556.

I ask that they all in incorporated in this record either by taking official notice or by incorporation by reference.

Mr. DANIELS: Now, if your Honor please, I would ask, in view of the voluminous offers that have just been made, or rather that voluminous testimony involved, and because of the importance of the matter, I would ask Mr. Durbin to connect up his offer by making a legal offer and the purpose of that offer. That is, what does he offer to prove in connection with the provisions under attack, and the ones

that we are now specifically speaking of are Sections 927.83 and 927.84, which question has been raised by the petitioner, Suncrest Farms, Inc.

The reason for that is that Suncrest Farms, Inc., the petitioner here, and also the petitioner tomorrow, were not [76] involved in the marketing area or the proposed extended marketing area in the hearing call which gave rise to the 1953 record, and the 1953 record at the 1956-1957 hearing, upon which the present order was promulgated, together with the provisions just mentioned, was not offered by reference, and no notice whatsoever has come to your petitioner, Suncrest Farms, Inc., and the petitioner tomorrow, Lehigh Valley Cooperative, that the secretary relies on another hearing according to which an interested person was not either of these petitioners. Therefore, I think I am entitled to find out from Mr. Durbin what he offers to prove, and why he offers to prove it.

It must be remembered that I am only attacking Sections 927.83 and 927.84, as it became effective August 1, 1957. I have no 15-A filed against any compensatory payment provisions existing prior to that time. Therefore, I am not called upon to say whether I think those provisions, whatever they were, were legal or illegal at that time. I am not in here on that issue. Now, I don't know just what the purpose is.

Examiner BAIN: Will you state the purpose?

Mr. DURBIN: The purpose for which this record is offered is because it is the basic record upon which the secretary acted in writing into Order 27 the provisions which are now contained in the amended order as Sections 927.83 and 927.84. Those provisions have been in the order since the [77] effective date of the amendment in 1953, or the early part of 1954. They were open at the hearing which began on June 18, 1956, and testimony was taken as to whether those provisions should be amended or remain as they were when they were extended to the additional territory. No one saw fit to introduce any testimony that they

should be amended, and the secretary, relying upon this record upon which he had originally placed them in Order 27, extended those provisions to the extended area. So that throughout this hearing there was notice to all of these boys that they had notice of it. There were other provisions of the order which were treated in the same way, and were extended to the additional territory. They had their opportunity, and the secretary issued this and included the entire territory.

Now, you can't have a provision of this type in effect in one part of a marketing area, and not in another part of the marketing area. So that we offer this to show the legality of the provisions and their adoption. And in the findings for the amended order that was issued effective August 1, 1957, the secretary made the finding, page 63 of this, under Section 927.0, Findings and Determination——

Mr. DANIELS: Wait until I find it. What are you looking at?

Mr. DURBIN: Decision issued by the secretary under Docket No. AO71-A-24, page 63, Section 927.0. "The findings and [78] determination hereinafter set forth are supplemental and in addition to the findings and determination previously made in connection with the issuance of the aforesaid order and of the previously-issued amendment thereto, and all of said previous findings and determinations are hereby ratified and affirmed, except in so far as such findings and determinations may be in conflict with the findings and determinations set forth herein."

And to show his findings, and so forth, we must go back to the record, the basis upon which he made those findings, and this is an amendment to Order No. 27.

Mr. DANIELS: Now, if your Honor please, I object to the introduction of these various matters referred to by Mr. Durbin. I am somewhat shocked to think that we would be faced with the voluminous record that he has now offered in his defense, or his answer to our petition for a 15-A proceeding in which we are attacking Sections 927.83 and

927.84. It puts us at a complete disadvantage. We couldn't possibly analyze the testimony in that record for some considerable time, and if we did, Mr. Durbin, I am quite sure, and probably the Hearing Officer would probably rule that we couldn't put testimony on contradicting what was said at that time, inasmuch as that was a record upon which an order was issued.

We are faced with this situation. It doesn't matter too [79] much what the secretary called this order that he issued as a result of the 1956-1957 hearing. Whether he calls it an amendment or not, it has been recognized by the Department after many federal hearings that our office has been involved in in many marketing areas, that when you extend a territory, and particularly if you do that in a substantial nature, that is a promulgation hearing so far as that new territory is concerned, and every provision in the then existing order is open and becomes what amounts to a proposal. If Mr. Durbin and the government believed that these records were necessary when they were trying to impress, or were considering impressing upon all of Northern New Jersey all of the provisions that had already been in existence in Order 27, then it was incumbent upon the government, in all fairness, in any type of judicial hearing, to ask the Hearing Officer to include in that record of the 1956-1957 hearing by reference or otherwise, the record previously made. That they did not do. The 1956-1957 record makes no reference to the 1953 hearing whatsoever.

Now, I should like to point out that Mr. Durbin is in error when he said there was no testimony offered directly on the compensatory payment provisions. Dr. C. W. Pierce, for the United Milk Producers Cooperative, did testify, and he testified there should be no compensatory payments unless more than 25 per cent of the business of the particular dealer was done in the marketing area. That is, the particular [80] dealer located outside of the marketing area, a non-pool plant, shouldn't be required to pay com-

pensatory payments unless his business was more than 25 per cent in the area.

Mr. Boger testified that compensatory payments were unjust and should not be incorporated unless they were bringing in cheap milk, and he testified no cheap milk from the area here involved was coming into the newly-extended marketing area—none at all.

Now, we are faced with this situation, that the secretary could go ahead and hold hearings in a very narrow area, and only those few people interested in that area come in and put in testimony upon which an order might be drawn, and then call a hearing to extend the territory, and without the secretary putting in one word of the previous testimony to support the extended territory, they would throw in all of the old record at a subsequent hearing.

We have no way to meet the evidence that he is putting in now. We had no way to meet the evidence in 1953 when it was put in the record, because when you look at Exhibit 1, which is the call of that hearing, it limits the hearing to the then marketing area, which was just a consideration of the extension of a few counties or townships in New York. It makes no reference to Northern New Jersey, no reference to Pennsylvania. We were not interested parties at that hearing. We received no notice of that hearing, unless by accident we got [81] the Federal Register. We would have no reason to read that Federal Register, or, after having read it, to believe that we should attend that hearing. To hold otherwise would mean that everybody in Chicago, St. Louis, and San Francisco might today have to read every Federal Register that contains a notice of a hearing for the New York Milk Marketing Area, because some day in the future the secretary might elect to amend the order and incorporate all of the provisions in that order, impressing them upon the people in Chicago, St. Louis, and San Francisco, without ever having given them an opportunity to be heard on the subject.

The duty wasn't ours, even though we did testify on compensatory payments, sir—the duty wasn't ours to sup-

port the proposals. The rules and regulations say proposals must be supported by testimony.

Now, it is one thing for the secretary to say that Sections 927.83 and 927.84 are supported by the 1956-1957 hearing record, but it is another thing to come in here and try to support those sections on a record that was made in 1953 which did not have any connection with the area here involved, and which did not make us interested parties, and he introduces it today rather than at the time that he promulgated those two sections, giving us no opportunity to meet it.

I think, sir, that this whole thing has cast quite a [82] shadow on the fairness and the ethical way in which interested people are treated in the hearings up to date. Here we are. We sat for 85 days, we read the declared policy of the secretary December 15, 1955, we read it again September 26, 1956, in which he said a hearing should be had on one subject, and one subject only—should there be—and I am only referring to this to show the position we are put in—should there be an order in Northern New Jersey, or should there be no order, ruling out entirely that it would be a comprehensive order or would become part of Order 27. After 85 days of hearing, and 11,000 pages of testimony, on February 26, 1957, the call was amended to include the question of whether or not we should become part of Order 27, and we had to go to issue on that on March 5th.

Now, I say the government, in fairness to these handlers and in fairness to the 10,000 producers, if they then believed that that was the way to proceed, should have introduced all of the old record then that they intended to introduce to support any of the then existing provisions of the order, which they might subsequently impress upon the new dealers.

Now, the secretary can put the word "amendment" above this if he wants to. You can label this a cocktail party if you want to. But it is still a hearing. It isn't the label that counts, it is what did he do substantially? The [83] substantial thing that he did was promulgate an

order including Northern New Jersey, even though he might have labeled it an amendment to Order 27. That is not what he did. He promulgated a brand new order from the first section to the last section. He changed the name of the order from New York Metropolitan Milk Marketing Area to New York-New Jersey Metropolitan Milk Marketing Area. But he saw fit——

Mr. DURBIN: Can't we have all of this in a brief?—

Mr. DANIELS: I am objecting to this.

But he saw fit just to pick certain provisions up that then existed in Order 27, and impress them, incorporate them into the new order and impress them on us. And he did that, sir, without offering this voluminous record and all of the exhibits that Mr. Durbin is now offering in evidence for the first time in answer to our petition saying that we think, (1) that Section 927.83 and 927.84 are invalid and void, and (2) that if they are valid and void, they have no application to us. And of course, our first proposition which we have gone over, that the whole extended territory was illegally incorporated in the new order.

I do not believe that you can write an order of this scope taking in this territory, I do not believe that it is the spirit of the act, or the spirit of the rules and regulations, or ought to be considered the judgment of the secretary, to say to people, "I am not going to tell you what [84] supports the provisions I am going to impress upon you. I am not going to tell you that at the main hearing. I will wait until you attack them, and then bring in a volume of information that no one can possibly digest, and if they did digest it, couldn't meet it because it was put in the record in 1953," and nothing will we find in the record that had anything to do with milk being shipped into Northern New Jersey. Nothing in the 1953 record has anything to do with milk being shipped from Pennsylvania into Northern New Jersey, and that is the issue here involved.

I object to it strenuously. I think we are going to be

put at a horrible disadvantage if it is placed in the record.

Examiner BAIN: Now, this is very definitely connected with the proposition as to what evidence you need to extend the New York area. However, I don't think I have to decide that at this time. I know I will later, but I don't think I have to decide it now. I think the question now is whether this 1953 record is admissible to support the compensatory payment provisions as they existed prior to August 1st of this year.

Now, looking at the petition, paragraph 7A—I am reading from my notes rather than the petition. That would indicate to me when I first read it that the petitioner is attacking the compensatory payments as they were before, as well as they are now. On the other hand, this morning I [85] believe Colonel Daniels stated he was not contending here that the compensatory payments were defective, or void, or anything else, before they were extended to Northern New Jersey. Now, if the colonel is attacking those payments as they existed in 1954, '55, and '56, I don't think there is any question but that we should have the 1953 record. If there is no attack on them, I don't see any necessity for that record at all.

Mr. DANIELS: If your Honor please, I am in no position here to attack the compensatory payment provisions. I have no legal position, and have not taken the legal steps necessary to attack the compensatory payment provisions as they might have existed prior to the extension of this order. I don't believe I am called upon here, or I don't believe I would be permitted to say whether they were or not. I think what you are saying, sir, is this, if I understand it, and I will make my legal position clear. That if I am attacking those payments back at that time and saying they were illegal then and hence must be illegal now, then, of course, I have to be faced with the record upon which they were based. I know that. But I am taking a different position, sir. I am taking the position (1) that there isn't anything in the 1956-1957 record which warned

us of the promulgation of these provisions so far as this extended territory in Northern New Jersey is concerned.

Examiner BAIN: That is the other question.

[86] Mr. DANIELS: And I am saying that the second legal position is that whether anything was legal or not in the previous order, they can't impress it on us without putting in the hearing notice, or in the record of the hearing, the testimony upon which they based those previous provisions which they may impress upon us in the extended territory, because if it isn't an out-and-out promulgation hearing, it is in the nature of that.

Now, that is my position, and I think I have it fairly well limited.

You see, Suncrest Farms, Inc., the petitioner today, and Lehigh Valley Cooperative, the petitioner tomorrow, were not previously affected in any way by Order 27, and of course, our attack is on Order 27 as it now stands, as it has been extended over Northern New Jersey, as they say they have a right to do. I take no position as to what might be legal at that time.

Mr. DURBIN: Mr. Hearing Examiner, I do not believe in the theory which Mr. Daniels has advanced, and so far as I know from the cases which have been decided, neither does the secretary agree with what he says, and I want to call your attention to paragraph 7B of this petition, in which the petitioner relies upon case after case to say these provisions are illegal, and he has said that throughout this proceeding. He said it in his argument on interim relief. He said it before [87] the enforcement action before the Court, and he is still saying it here, that these provisions are illegal, and if he is willing to admit that these provisions are legal, that there is legality for the order provisions except for the extension of the marketing area, then we might go along and say we don't need the 1953 hearing. But until he makes such an admission as that, he is testing the legality, and we must have the testimony on which the secretary based his decision to put them in the

order, as well as the evidence that he used to extend it without amendment to the territory, the extended territory.

Now, bear in mind that all through this proceeding every provision was open, and people could, and were invited, to give testimony as to every one of those provisions, and the secretary has used the evidence on which the provisions were originally written, the evidence in this last hearing on which they were introduced, the testimony showing that probably they should be changed, and he decided on the basis of the evidence they should not be changed, and wrote them into the extended order extending the territory, and making them throughout the marketing area covered by Order 27. So he can't say that without notice they should have been this or that. If you followed the theory advanced by Colonel Daniels the secretary would have to spread on the record of every hearing every hearing record that had preceded it. Otherwise, [88] you wouldn't have any record at all on which you could base these provisions.

Mr. DANIELS: If your Honor please, Mr. Durbin has misunderstood the position I take. Let me first talk about the Kass case. I am quoting the Kass case as authority on principle I didn't say the Kass case ruled on compensatory payments directly since 1953, up to August 1, 1957, or since 1957. Of course, the Kass case hasn't. The Kass case announced a legal principle. I say the legal principle was ignored here since August 1, 1957. I don't know what they did from 1953 to 1957. I wasn't interested in the case.

Now, then, every provision is open. You see, Mr. Durbin in admitting every provision is open, and he cannot admit otherwise, when you extend a territory it is a promulgation hearing for that territory, and every provisions is open. But it isn't our duty, it isn't within our knowledge to know. Suncrest Farms, Inc., nor their counsel, nor Lehigh Valley, had no idea, they had no reason to know that there was a 1953 record. If every provision was open, and if the Government wanted to give us the opportunity that now he says we had, they could have just as easily introduced this at the

1956-1957 hearing, as they are now attempting to introduce it here.

Now, what he says, that every time the secretary wants to amend an order he would have to bring in all of the old records, is not a fact except when he tries to extend the [89] territory. That opens every provision of the order. Then, of course, the new people, the new interested parties that he has brought in, are entitled to know exactly upon what the secretary bases his decision. Otherwise, we come to hearings blind, and do not have an opportunity.

It is merely a gratuitous statement to say that the provisions were open and we had our opportunity. We used every opportunity we had and that we knew of, but we knew nothing of this record.

Examiner BAIN: Well, it is still not the time to decide the question of where the burden is when the territory is extended. The question we have now is the offer of the 1953 record. Certainly the 1953 record has not served to extend anything to the new area. I don't imagine the government offered it for that purpose. I think that is just as clear as that an attack on these provisions before the recent amendment must be based on the 1953 record. I think the petitioner may get itself into a difficult position later if he wants to argue the Kass case, and the tariff barrier, and some of those things, if this record is not in. And yet, they apparently are not attacking the provisions as they applied to New York before the recent amendment extending the order to New Jersey. Now, if that is the actual contention, and the contention is not made later that they were void on the basis of their own promulgation record, I think the objection is good [90] to accepting the 1953 record.

Mr. DANIELS: And all exhibits in connection with that.

Examiner BAIN: Yes, sir.

Mr. DURBIN: I want to except to your Honor's ruling, and by way of offer of proof, I would offer to prove by this record that if your Honor is wrong, so that this record may be adopted and used as part of this hearing in the event you are wrong.

Examiner BAIN: You mean you intend to offer that in case the Judicial Officer thinks my ruling was wrong, that he can admit it at that time?

Mr. DURBIN: Yes, on the basis it is now being offered.

Mr. DANIELS: I object to that, because I believe that if the Judicial Officer thinks your ruling is wrong, I should then like to be in the position where the hearing would have to be reopened, and I could meet this record. I don't want this record to go in without opportunity to meet it. I don't know what is in it, and it takes weeks to read it, and I don't know what is in there. So I certainly wouldn't agree to that going in without my being able to controvert it.

Mr. DURBIN: You would have the right to controvert it in that way.

Now, I am perfectly willing that this record go in with the same ruling that the Hearing Officer made this morning as to the 1956-1957 hearing, that any part of this that we [91] mention in briefs would be a part of the record, so that it can be used if it is necessary, and then you will have plenty of time in which to read this record.

Mr. DANIELS: But I have no more hearing. I can't put witnesses on to meet it.

Mr. DURBIN: You couldn't anyway.

Mr. DANIELS: I what?

Mr. DURBIN: You couldn't anyway.

Mr. DANIELS: Oh, yes, I can. If you are going to put that record in in order to support this, and you are offering it as evidence, all evidence that you put in I can meet with testimony. The Hearing Officer may limit me as to the purpose, but I certainly would have a right to meet it even on the ruling that in the event 927.83 and 927.84 are legal, that these two petitioners might be exempt. Of course I have a right to say something about that.

Mr. DURBIN: The Hearing Examiner has already ruled that the legality of a provision of this order has to be based on the record before the secretary on which he issued it.

Mr. DANIELS: No, he has not so ruled.

Mr. DURBIN: Yes, he has.

Mr. DANIELS: No, sir. The extension of the territory had to be based on that. He would not allow me to put on testimony as to specific prices that this petitioner paid if [92] it were to be used to strike down the validity of the whole statute. But he has not ruled that testimony can't come in here of a general character applying to everybody attacking the validity of these two——

Mr. DURBIN: No, he didn't.

Mr. DANIELS: —provisions, 927.83 and 927.84. And I say to you, if what you now say is true, that you can't attack the validity of .83 and .84 as a whole, but it must be based on the 1956-1957 record, then I say to you that your offer is not proper under any circumstances, even attacking it before 1957, because you have introduced a record to do what? Support the validity of an order. And you say I can't put any testimony in to attack the validity of that order. Why, you can't mean that, I don't believe.

Examiner BAIN: Well, as to the effectiveness of an offer of proof, I wouldn't understand it would be legal, for example, for the Judicial Officer to admit it if he thought my ruling was wrong, without giving the petitioner time to make the other objections. I know as written in the rules of practice it can be done, but I don't think it would stand up. That, of course, would be out of my hands by that time.

I might raise this word of caution. If it is later contended by the petitioner that those payments were void, defective, before they were extended to New Jersey, it might be necessary to introduce that record. But at this time I [93] don't think they are arguing that.

Mr. DANIELS: I think that is right, sir. I think if I contend they are void ab initio, from the time they were promulgated, then I believe that this record would be material. But at the moment I have limited—I am not saying whether they were legal or not legal at that time. And if I do raise the question subsequently that they were illegal, I might be faced with the fact that were was a record there, and they were not attacked at that time. At the present time

though I stand on the matter as I outlined it, and as you understand it, and as Mr. Durbin understands it, and I object to this offer he just made now to have the record in tentatively.

Mr. DURBIN: I would like to be heard further.

Examiner BAIN: Well, he has made the offer. It is not an offer tentatively.

Mr. DANIELS: You haven't ruled on my objection, have you—the last one?

Examiner BAIN: Well, I think he is entitled to make an offer of proof any time he wants to.

Mr. DANIELS: Well, he wants the record to go in to prove your ruling was wrong.

Examiner BAIN: Well, I haven't ruled that that can be done. That cannot be done.

Mr. DURBIN: My proffer was that it be incorporated by reference, just like——

[94] Mr. DANIELS: And I object, because it goes to the Judicial Officer if he wants to use it, and if I understand the Examiner has the same objection.

Examiner BAIN: Yes.

Mr. DURBIN: And I still want to be heard, because I want clarification of your ruling. There are handlers under this order who have been subject to it in Northern New Jersey, and have been for years, who have paid compensatory payments, and if you are saying that these provisions are valid up to the time that they were extended in Northern New Jersey, that might be all right. But otherwise, we are going to have to have this record in here, which was before the secretary, because compensatory payments have been collected under this provision over a period of three or four years from handlers in the same situation that these handlers are in, and if you are saying it is invalid in one section of this order, it has to be invalid in all sections of the order.

Examiner BAIN: No, if it was illegal to extend it to Northern New Jersey, that is all.

Mr. DURBIN: If you say the extension of the order was illegal.

Examiner BAIN: If I say that, yes.

Mr. DURBIN: When you extend the area you extend the provisions of the order over the entire area.

Mr. DANIELS: That is not necessarily true. The [95] hearing order to decide the extension of the territory was legal, but the incorporation of certain provisions wasn't because they weren't sustained.

Examiner BAIN: That is correct.

Mr. DURBIN: Are you saying that when the area was extended to Northern New Jersey that it was legal, and if so, this provision goes along with it?

Mr. DANIELS: You haven't ruled either way.

Examiner BAIN: No, I haven't come to that.

Mr. DURBIN: We are saying we have this record to show the validity of that to be extended. It is taken in connection with the proof that is in the record for the 1956-1957 hearing.

Examiner BAIN: No, because this 1953 record was not before the secretary when he made his decision on the 1956-1957 record.

Mr. DANIELS: And, if your Honor please, as you have aptly stated, the government didn't rely on this record for extension of the territory.

Mr. DURBIN: Oh, yes, we did.

Examiner BAIN: Well, if you did, I can make my decision right now, because if you did the secretary has gone outside the record to make his decision.

Mr. DURBIN: I misunderstood. What I am saying is that we relied on this record, 1953 record, for this provision, and relying on that record and the evidence that went in the 1956- [96] 1957 hearing, the secretary decided to extend that provision into Northern New Jersey, along with the other provisions of Order 27, and you can't cut the two apart.

Mr. DANIELS: I think you can argue, and I think we have argued it sufficiently.

Mr. DURBIN: The secretary himself already found that way.

Mr. DANIELS: If the secretary found that way in 927.0, and means it exactly the way you interpret it, the Hearing Officer is 100 per cent right. He went outside the record, because this record was not in the hearing—the 1953 record was not.

Mr. DURBIN: The findings he made on that record are in there.

Mr. DANIELS: But not in the 1956-1957 hearing, and you didn't offer them. Nobody did.

Mr. DURBIN: They were all in that hearing.

Examiner BAIN: May I make this observation?

Mr. DURBIN: To review the action of the secretary, you have to have that record in here, and the findings he made on the basis of that record, to determine whether these things were valid.

Mr. DANIELS: Where I am completely confounded is this. If this 1953 record is so important, I do not understand why it was not offered in the 1956-1957 hearing, and it was not. [97] Mr. DURBIN: Because the government was not offering that evidence in that record. We were relying on the record we already had.

Examiner BAIN: Well, if the 1953 hearing was before the secretary when he made his recent decision, it is before us anyway. We don't have to incorporate it.

Mr. DANIELS: You mean the 1956-1957 record?

Examiner BAIN: Yes.

Mr. DANIELS: If the 1953 record was in the 1956-1957 record?

Examiner BAIN: Yes. It is already available.

Mr. DANIELS: And if it isn't then it isn't available.

Examiner BAIN: Yes.

Mr. DANIELS: I agree to that.

(Witness excused.)

Mr. DANIELS: If your Honor please, if the offer and all the argument are incorporated in the record, you say you are not copying your ruling in?

Examiner BAIN: I want my ruling copied in, and if there is nothing further, that will be my ruling in this proceeding; but I understand Mr. Durbin wants to add further to his statement.

Mr. DANIELS: Isn't he then just asking that you reconsider your ruling, so that the record when we look at it will be—he is just asking that you reconsider your ruling, [98] wouldn't that be the case?

Examiner BAIN: Well, I don't care what you call it technically, I don't think so, because I haven't made a ruling in the present proceeding yet. My ruling yesterday was final so far as that proceeding goes.

Mr. DANIELS: Yes, but when that ruling appears in this record, copied into this record, it will appear as though you made it in this proceeding.

Examiner BAIN: Well, if it seems that way, I will say that I will now reconsider that motion. I believe you are correct.

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[100] DIRECT EXAMINATION

By Mr. DANIELS:

Q. Mr. Boger, will you state your full name, please?

A. Glenn A. Boger.

Q. Where do you live?

A. R.D. 2, Allentown, Pennsylvania.

Q. What is your connection with the petitioner, Lehigh [101] Valley Cooperative Farmers?

A. I am president and general manager of Lehigh Valley Cooperative Farmers.

Q. How long have you held that position?

A. 24 years.

Q. How many members have you?

A. About 3,400.

Q. How many of them are milk producers?

A. 910—910 are actual shippers to our plant; practically all of them are milk producers.

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[103] Q. Will you tell me the products that you process and [104] manufacture in your plant?

A. We manufacture, process fluid milk, cream, butterfat, chocolate milk, cottage cheese, yogurt, sour cream, ice cream, condensed milk, powdered milk. I think that covers all of them.

Q. How much milk do you handle in a year?

A. Last year it was a little over 180,000,000 pounds.

Q. It was 184,000,000 and something, was it not?

A. I believe so. I think it's in the record, the exact figures.

Q. How is it running this year?

A. It's running more than that this year.

Q. What is your sales area for fluid milk and cottage cheese?

A. Well, our sales area has been within a radius of about 35 miles from Allentown.

Q. And that would take you, the 35 miles from Allentown, into Phillipsburg, New Jersey?

A. Yes, it covers practically all of Warren County, New Jersey.

Q. How long have you been in that market?

A. About 20—a little—about 22 years, I would say.

Q. Can you name the competitors in that market?

A. I don't have that list with me. I can name some of them, but not all of them offhand.

Q. Well, is Sunerest Farms, Inc., one of them?

[105] A. Yes, Sunerest Farms, and Easton Sanitary Dairy, Moyer's Dairy from Easton, and——

Q. Is Bush?

A. Bush is one. Port Mary is one.

Q. Garden State?

A. Yes, Garden State.

Q. Fairview?

A. Fairview Dairy is one.

Q. How many routes have you in that area?

A. I believe we have five routes there, wholesale and retail.

Q. Do you know how much milk you sold in that area in the months of August and September; do you have your reports before you that you filed with the Administrator?

A. Well, our . . . the reports we filed with the Administrator I believe cover all of the fluid milk we sold in New Jersey in that area. In that area it's approximately 8,000 quarters of bottled milk per day.

Q. 8,000 per day?

A. Bottled milk and cream.

Q. That is in Phillipsburg or Warren County?

A. That's in Warren County.

Q. Do you abide by the minimum prices fixed by the Office of Milk Industry of the State of New Jersey?

A. Yes, we do.

[106] Q. I mean are your minimum resale prices the minimum prices fixed by the Office of Milk Industry, State of New Jersey?

A. They are.

Q. What percentage of milk, of your milk, is sold in that area, roughly? I am talking about Warren County.

A. Well, I'd say about 3 per cent, 3 to 4 per cent. That's 3 or 4 per cent of our total milk taken into our plant. It's more than—it's a larger percentage of our bottled milk business, it's—it's about 8 per cent of our bottled milk business.

Q. What percentage of the milk sold in that area is sold by dealers whose plants are located in Pennsylvania?

A. Is sold by what?

Q. Dealers whose plants are located in Pennsylvania.

A. Well, a very large percentage of it, in fact, most of it. I would say 75 to 80 per cent of it.

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[109] By Mr. Daniels:

Q. Now, Mr. Boger, you are in competition with many dealers in the State of Pennsylvania for sales in Pennsylvania, are you not?

A. Yes, indeed.

Q. Would 85 per cent of your fluid sales, fluid milk sales, in packaged milk, be sold in Pennsylvania?

Let me rephrase the question: Would 85 per cent of your Class I sales be sold in Pennsylvania?

A. Yes.

Q. Now, Mr. Boger, will you tell me whether or not you are a handler subject to the provisions of Federal Order 61?

A. Yes, we are.

Q. Would you tell me what the ratio is between the milk you sell in the marketing area of Order 27 and the milk you sell [110] in the marketing area of Order 61?

A. We sell about five times as much milk in the marketing area of Order 61 as we sell in the marketing area of Order 27.

Q. Now, the milk we are speaking of is fluid milk, Class I milk?

A. Class I milk.

Q. And Class I-A milk?

A. That's right.

Q. Class I-A milk being fluid milk under Order 27, and Class I milk being fluid milk under Order 61?

A. That is right.

Q. So that, that being so, you haven't any option under Order 27 which would give you the right either to become a pool plant or a plant subject to the compensatory provisions as they are now written, you have to be under the compensatory provisions as they are now written, you have to be under the compensatory provisions, do you not?

A. That is my understanding, yes, sir.

Q. In what areas in Pennsylvania do you sell your fluid milk?

A. Well, it's—our bottled milk is also within an area of about 35 miles from Allentown, and tanker milk is sold in the City of Philadelphia.

Q. You are not shipping tank milk into the marketing area [111] of Order 27 now, or have you since August 1, 1957?

A. No, we have not.

Q. Your shippers, as a non-pool plant under Order 27, could in no way participate in the New York pool?

A. That is my understanding, they could not.

Q. Do you sell any condensed or powdered milk in the area of Order 27, the marketing area of Order 27?

A. No, we do not.

Q. You do sell some butter?

A. Yes, a small amount.

Q. But you do not manufacture butter?

A. No. We only sell it on our retail routes, we do not sell any wholesale.

Q. In the marketing area of Order 27 you sell fluid milk, fluid cream, cottage cheese, butter; is that correct?

A. Yes.

Q. Buttermilk?

A. Buttermilk.

Q. Chocolate milk?

A. Yes.

Q. And of course skim milk?

A. Skim milk.

Q. Any ice cream?

A. Ice cream, yogurt.

Q. Will you tell me what you returned to your farmers as a [112] blend price in August of 1957?

A. $5.56 per hundredweight.

Q. What fat basis?

A. Four per cent.

Q. What did you return to your producers in September of 1957?

A. $5.57 a hundredweight.

Q. What was your Class I utilization in August 1957?

A. According to the figures of the Philadelphia Market Administrator, on the basis of our reports to Order 61, it was 70 per cent.

Q. And what was it in September?

A. 70 per cent.

Q. The same in both months?

A. The same in both months.

Mr. DURBIN: Is that Philadelphia Class I milk, or New York Order 27 Class I-A?

Q. That would be Philadelphia Class I milk?

A. That is right.

Q. Have you filed reports with the Market Administrator of Order 27 for the months of August and September?

A. Yes, we have

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[113] Q. When we talk about surplus milk, maybe you better [114] explain for the record what you call surplus milk.

A. Well, the milk that is over and above our requirements for bottled milk and bottled cream and fluid products is your surplus milk, which we manufacture into cottage cheese, ice cream, and condensed milk and milk powder. Whatever this surplus develops at any time during the year, we manufacture. And that has happened in the spring months, it's happened in the fall months. In fact, about three years ago, when—three weeks ago, when production came up, sales declined a little bit, why, we were manufacturing condensed milk and milk powder for about a week there, around the clock.

Q. Mr. Boger, do you ever ask your farmers to hold or divert any of their milk?

A. We have never asked our farmers to hold back any milk or to divert any of their milk to any other outlet.

Q. Do you take their increased production into your plant, if they increase their production?

A. We do.

Q. And your Class I utilization for the fiscal year of 1956, or 1957,—I don't know what you would call it, it ended on the 31st of January, 1957—was what, your Class I percentage?

Mr. DURBIN: May I ask you to clarify that, because there were no classes at that time.

Q. Class I utilization as defined by the Pennsylvania [115] Milk Control Commission, which is roughly all fluid milk products.

A. In answer to your question, Mr. Durbin, according to the Pennsylvania Milk Control Commission, to whom we have made monthly reports, they have told me in reply to my request that our average Class I utilization for the year was about 63 per cent, 63 and a fraction per cent.

Q. And you return to your farmers how much over the price that would have been established by the Pennsylvania Milk Control Commission that year?

A. For that year it was something over $700,000, I believe $745,000. I believe that's in the record.

Q. So that 47 per cent of your milk receipts, then, in that year——

A. 37 per cent.

Q. Or 37 per cent, rather, found its way into powdered, condensed, ice cream, and cottage cheese, and so forth?

A. That's right.

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[117] Q. All right, I will ask it once more: Mr. Boger, you do watch the uniform price as announced by the Market Administrator?

A. Yes, sir.

Q. And you do know your own uniform prices?

[118] A. Yes, sir.

Q. And you do know how much more you pay than you

would have been required to pay under the Pennsylvania Milk Control Commission—that figure you put in the record?

A. Yes.

Q. How much more did you pay than you would have been required to pay had you paid the Market Administrator's prices?

Mr. DURBIN: I object again, because he is a cooperative association, and would not have been required to pay the price. He has the right to reblend, if his conclusion, as stated in this record, is correct, that he is a Kapper-Volstead co-op.

Mr. DANIELS: Well, my question said how much more did he return than he would have been required to return had he paid the Administrator's prices. That was the premise of my question.

Mr. DURBIN: All right, again, which Administrator's price, which price are you talking about?

Mr. DANIELS: The Order 27 price.

Examiner BAIN: I think you may answer.

The WITNESS: Well, I determined that figure, and I asked the accountants of the Pennsylvania Milk Control Commission.

By Mr. Daniels:

Q. Mr. Boger, just give me the figure you determined, not what they told you.

A. It was a little over $1,800,000. I put that in the [119] record previously, however.

Q. Yes, I think it is in the record.

A. But it was a little over $1,800,000 for the year.

Q. Do you ever turn any surplus back to any Order 27 plants?

A. No.

Q. Do you sell milk in the marketing area of Order 27 as extended, below what that milk would have cost under Federal Order 27 price structure?

A. No, we do not.

Q. And your resale price of packaged milk is what?

A. Minimum prices, as established by the Office of Milk Industry.

Q. When they were not establishing a price, how did you determine your resale price in the State of New Jersey?

A. We sold at the same price in New Jersey that we were selling across the river in Easton, Pennsylvania, and those prices were the same as the minimum prices set by the Pennsylvania Milk Control Commission.

Q. Did the competition sell at those same prices?

A. I think they did. From all reports that I had, I think there was—they all did.

Q. How much were you required to pay to the Registry of the United States District Court for the Eastern District of Pennsylvania by way of compensatory payments for the month of [120] August, 1957?

A. Well, these adjusted figures came in from the New York Market Administrator yesterday morning, into my office, the morning that I left to come to New York. And the amount that we actually paid in was something over $35,000 for the two months.

Q. What two months?

A. August and September. The adjusted figures, as reported to us by the Market Administrator, should be $39,444.03. So there is approximately $4,000 that we haven't paid in as yet.

But I brought this right along with me, and it has not been turned over to our office as yet.

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[123] Q. Mr. Boger, you are president of the petitioning company or cooperative; can your cooperative economically operate in this area by returning to your producers what the policy has been to return to them, and still pay the rest of approximately $20,000 a month into the pool?

A. Well, it would mean taking that much money away from our producers in shipping milk to our plant, and we cannot pay less than Pennsylvania Milk Control Board prices to our producers and hold producers, we don't have an iron-bound contract with our producers, with heavy penalties, as some cooperatives have, and we don't attempt to hold our producers if they have other markets.

Farmers in the Lehigh Valley, we take on any farmer at any time who wants to ship milk to us, providing he can pass the necessary sanitary requirements, and we make no attempt to hold him if he can find a better market for his milk. So that if our price to our producers is lowered to any great extent, it would mean that we would lose producers.

Q. So that while the Pennsylvania Milk Control Commission cannot tell you the actual dollars you have to pay to the farmers, as a practical matter you have to pay those blend prices or you do lose your shippers?

A. That is correct. We have—we have a policy and a belief that if a cooperative cannot do as well or better than [124] any other operator, that there is no excuse for our existence.

Q. And no reason for shippers to stay with you?

A. That is correct.

* * * * *

[137] Q. Mr. Boger, do you have a record of the amount of milk that you manufactured in August and September of 1957?

[138] A. Yes, I have the record that was submitted to the Administrator.

Q. Will you read the amount of products that were manufactured, or the amount of milk that went into manufactured products? Read it into the record, please.

A. These are the pounds of the products that were manufactured.

Q. Product pounds, or milk pounds?

A. Product pounds. 1,161,143 pounds plain skim condensed milk. 2,146,068 pounds of cottage cheese. 121,400 pounds of skim milk powdered. 18,670 pounds of shake mix. 707,660 pounds ice cream mix. 5,130 pounds sherbet. Representing a total of 203,586 pounds of butterfat in those products for the month of August.

Q. Do you have the same calculation for September?

Mr. DURBIN: Mr. Hearing Examiner, might I suggest that these be made a part of the record as exhibits, and why have him read those figures from the exhibit unless there is some reason?

Mr. DANIELS: Well, I don't know that they are going to be made part of the record.

Mr. DURBIN: Well, we can make them part of the record.

By Mr. Daniels:

Q. Are you reading from your report?

A. Yes.

[139] Mr. DANIELS: Well, Mr. Durbin, I have no wish to clutter the record up and delay it, if you are going to offer his reports in evidence.

Mr. DURBIN: We are going to offer them in the record, and I think it would probably be better to put them in in series rather than to offer separate ones——

Mr. DANIELS: I am not going to object to you putting his reports in.

Mr. DURBIN: I say, if you want them in right now, we can put them in right now, but I would rather wait and put them all in when I have the witness.

Mr. DANIELS: Perfectly all right.

By Mr. DANIELS:

Q. Without going into detail, because the reports are not in evidence yet, but Mr. Boger, did you report some sales of buttermilk and skim milk in cans to buyers in Order

27 Marketing Area in the months of August and September, 1957?

A. Yes.

Q. Did you sell that to handlers under Order 27?

A. Yes.

Q. Did you charge more for those products than the Order 27 prices would have established for the milk going into the products, plus what it cost you to make them?

A. Yes.

Mr. DANIELS: Cross-examination.

[140] Examiner BAIN: Do you wish to cross-examine before we recess for lunch, or afterward?

Mr. DURBIN: After lunch.

Examiner BAIN: We will recess until 1:30.

(Whereupon, a recess was taken from 12:05 o'clock, p.m., to 1:30 o'clock, p.m., for lunch.)

[141] AFTERNOON SESSION

1:30 P.M.

Whereupon, GLENN A. BOGER, resumed the stand, and testified further as follows:

Examiner BAIN: Please come to order.

I believe you had completed the direct testimony, is that correct?

Mr. DANIELS: I have a couple of questions that occurred to me at lunch.

DIRECT EXAMINATION. (Continued)

By Mr. DANIELS:

Q. Mr. Boger, the milk that you ship into the marketing area of Order 61 is all shipped in from your plant, is it not?

A. That is right.

Q. None of it is shipped directly to any buyers in that area from members of your cooperative?

A. That is correct.

Q. And that has been so since July of 1957?

A. That is correct.

Q. Are you eligible for cooperative payments?

A. No, we are not.

Q. Do any of the coops that receive cooperative payments have members in the area from which you purchase milk?

[142] A. Not to my knowledge. I don't have any——

Mr. DANIELS: I may take him back for one question afterwards, I am not sure yet. Cross-examination.

CROSS-EXAMINATION.

By Mr. DURBIN:

Q. Mr. Boger, does your plant at Allentown have health approval from any authority, health authority, to send milk into the marketing area?

A. Oh, yes, we have New Jersey approval, yes, my answer is yes.

Q. And does the plant also hold health approval to ship milk into Philadelphia?

A. Yes.

Q. When did they secure that approval?

A. Oh, well, I couldn't say, but we have been shipping milk and cream into Philadelphia for years.

Mr. DANIELS: I cannot hear either one of you.

Mr. DURBIN: Sorry, Colonel, I will try to raise my voice.

Mr. DANIELS: Did you say it has been a number of years? Speak up a little, will you, so I can hear you.

The WITNESS: Yes, we have been shipping milk and cream into Philadelphia for a number of years.

Mr. DANIELS: Under health approval?

The WITNESS: Yes, under health approval.

By Mr. DURBIN:

[143] Q. How far back does that approval go for shipping milk into New Jersey?

A. Oh, more than 20 years.

Q. Now, you say you have a total of 3400 members, of which 910 were shipping to your plant; what do you mean, what is the distinction between the 910 and the 3400?

A. We have a large number of members who use our breeding service, and we take on members for use of breeding service, up to a 45-mile radius. 35 miles, up until recently, has been the limit on which we have taken milk shippers.

Furthermore, in that—among those members are a number of milk shippers who cannot pass the necessary sanitary inspection to ship milk to our plant, but they—but they can use the breeding service.

Q. But the 910 members who do ship to your plant have the approval, the necessary health approval, to be Grade A shippers; is that correct?

A. That's right. Also approved for Lower Merion Township.

Mr. DANIELS: In Pennsylvania?

The WITNESS: In Pennsylvania.

Mr. DANIELS: Montgomery County?

The WITNESS: Montgomery County, yes.

By Mr. DURBIN:

Q. And has that approval also gone back over a period of [144] years?

A. No, that approval, full approval, was only given in June of this year.

Mr. DANIELS: I don't know what either one meant by "that approval." Which one?

The WITNESS: You mean our Lower Merion Township approval?

By Mr. DURBIN:

Q. Yes, sir.

A. That was given in June of this year.

Q. Is that Merion Township approval such that it permits you to ship also into Philadelphia?

A. Yes. And at one time the City of Newark also accepted Lower Merion Township approval for shipment into the City of Newark. I'm not sure that they do that at the present time, but years ago, when we had that approval, Newark, the City of Newark, also accepted that inspection, farm inspection of Lower Merion Township for shipment of milk into the City of Newark. I'm not sure that they do at the present time, because we have not asked for Newark approval.

Q. Well, have you a separate approval, aside from the Lower Merion Township approval, to ship milk into Philadelphia?

A. No, we have—our milk is shipped into Philadelphia, is shipped to the Sylvan Seal Company in Philadelphia, and undoubtedly they have approval of our plant.

Q. That would be approval as a source of milk——

[145] A. Yes.

Q. —for the Sylvan Seal?

A. Yes.

Q. How do you get the milk to your plant in Allentown from these various shippers?

A. Well, it's hauled in by contract haulers.

Q. Do you get it by can delivery altogether?

A. Some of it comes by can delivery. Most of it comes by can delivery; some of it in bulk tanks.

Q. And do you have regular bulk tank routes that operate to bring in the bulk tank shippers' milk?

A. Yes.

• • • • •

[147] Q. When you ship milk from your plant in Allentown to the Sylvan Seal Dairy in Philadelphia, is that shipped in bulk tank?

A. Yes, sir.

Q. Are those tankers filled up on the farm and sent straight in to Sylvan Seal, or how is that handled?

A. They all come into the plant first.

Q. What do you mean by coming into the plant?

A. They come into the plant, and that day they are to go down to Sylvan Seal in Philadelphia, we fill the tank up at the plant and send it down to Sylvan Seal in Philadelphia.

Q. In other words, if the tanker is not full when it comes into your plant at Allentown——

A. Yes.

Q. —then you pump some other milk into it, and fill it up, so that you have a full load——

A. We send a full load down.

Q. And then that goes to Sylvan Seal in Philadelphia?

[148] A. Right.

Q. Now, in the event that that tank truck is completely loaded, completely full when it comes into your plant, how do you handle that milk?

A. If they require that in Philadelphia that day, if it is completely full, why, we send it down. We can't put any more in it if it is completely full.

Q. In neither instance, then, do you take any milk out of these farm tank trucks that come into the plant——

A. Only a sample for testing.

Mr. DANIELS: Could I hear that question?

(Last question read.)

Mr. DANIELS: Do you mean you never take any milk out, is that what you are saying?

The WITNESS: Well, if it isn't required, if Sylvan Seal doesn't require that milk that day, we take it all out and dump it, and that's manufactured.

* * * * *

[165] By Mr. DURBIN:

Q. Now, Mr. Boger, you have in front of you a copy of your report which you filed with the Market Administrator of Order 27 for the month of August, 1957; is that correct?

A. Yes, sir.

Q. And that is the report that was filed by the Lehigh Valley Cooperative Farmers with the Market Administrator for the month of August, 1957, the Market Administrator of Order 27?

A. I believe that is correct.

Mr. DURBIN: If your Honor please, I ask that this report be made a part of the evidence in this hearing. Here are four copies.

Examiner BAIN: Is there any objection?

Mr. DANIELS: No, I have no objection.

Examiner BAIN: It is admitted as Exhibit 8.

(Thereupon, the document above-referred to was marked Exhibit No. 8 in evidence.)

Mr. DANIELS: I want it to appear, though, that it is part of the government's case, and not ours.

By Mr. DURBIN:

Q. Mr. Boger, you also have in front of you a copy of the report which you filed on behalf of the Lehigh Valley Cooperative Farmers with the Market Administration for Order 27 for the month of September, 1957; is that a correct copy of the original report which you filed with the Market Administrator?

A. I believe it is.

[166] Mr. DURBIN: Mr. Presiding Officer, I hand you four copies of that report, and ask that they be admitted in evidence.

Examiner BAIN: Any objection?

Mr. DANIELS: No objection, provided it is part of the government's case, and not ours.

Examiner BAIN: It is admitted as Exhibit No. 9.

(Thereupon, the document above-referred to was marked Exhibit No. 9 in evidence.)

. . . . . .

[168] Q. You do know, do you not, that so far the Lehigh Valley Cooperative Farmers has not been designated as a pool plant?

A. I know that, because I know that they cannot be designated as a pool plant.

Q. And do you know whether or not——

Mr. DANIELS: You just keep your answer to the question.

Q. Do you know whether or not the Sunerest Farms, Inc., has been designated as a pool plant under Order 27?

Mr. DANIELS: Well, let me stipulate that it hasn't. He wouldn't know, but I do know, and I will say it has not. I mean by that that Mr. Boger wouldn't know except from hearsay, but I will stipulate that it has not.

By Mr. DURBIN:

Q. Do you compete in the purchase of milk from producers with the plants located in New Jersey, that is, the Bush plant, the Port Mary, Garden State, Fairview Dairies, I believe, as you named them?

A. No, we do not.

Q. Do you compete in the purchase of milk from producers with the other plants in the Allentown area, that is, plants located in Pennsylvania, for the purchase of milk?

A. Yes.

Q. Would you tell me what plants you compete with in the purchase of milk?

[169] A. Oh, there are about—I would say there are about 20, 25 companies purchasing milk in the area that—in which we are purchasing. Abbott's of Philadelphia, Supplee's of Philadelphia——

Q. Would you just say the approximate number from Philadelphia, without trying to name all of the plants in Philadelphia?

A. Well, I would say altogether there is probably 20, 25 plants in Reading, Philadelphia, Allentown, Bethlehem,

Easton, and those towns around there, who purchase milk in the same area that we purchase it.

Q. And you also come in competition with the designated pool plants under Order 27 in purchasing milk in that area, do you not?

A. I don't know of any Order 27 plants purchasing milk in the area where we are purchasing.

Q. What is the area in which you purchase milk from producers?

A. Well, it's parts of Northampton, Lehigh, Bucks, Montgomery, Burks and Monroe Counties.

Mr. DANIELS: Give the mileage radius from your plant.

The WITNESS: All of our shippers at the present time are within a radius of 35 miles of our plant. I believe we have two shippers at the present time from over in New Jersey.

By Mr. DURBIN:

[170] Q. Mr. Boger, you have testified that you were regulated by the Philadelphia, I believe; what date did you become subject to the Philadelphia order?

A. July 1st.

Mr. DANIELS: Of what year?

The WITNESS: 1957.

By Mr. DURBIN:

Q. Upon what basis, what factual basis, did you become subject to the Philadelphia order?

A. Well, that was at a time when we, after we had received final approval from Lower Merion Township, when we could take all of this milk into our plant and ship direct from our plant into Philadelphia—Sylvan Seal in Philadelphia, without having to take it direct from farmers into Sylvan Seal of Philadelphia.

Q. So that prior to July 1st the milk that you were send-

ing to Sylvan Seal Dairy in Philadelphia was direct delivery from the farms to that dairy; is that correct?

A. It went in there part of the time, and other times, when they didn't need it, it came into our plant.

Q. But whenever they needed the farm milk it went direct from the farm——

A. From the farm, that is correct.

Q. —to the Sylvan Seal Dairy?

A. That is correct.

[171] Q. And you changed from the direct shipment from the farms to Sylvan Seal on July 1st?

A. That is correct.

Q. Of 1957?

A. Right.

• • • • •

[175] By Mr. DURBIN:

Q. Mr. Boger, you have testified that the bulk of your sales into New Jersey was packaged sales.

A. It is packaged sales.

Mr. DANIELS: What period?

Q. That is true now?

A. Yes.

Q. How long has——

A. You are referring to Order 27, into the Order 27 area, I assume?

Q. Yes.

A. Yes, the bulk of it is packaged sales.

Q. How long has that been true?

A. Oh, it's been true since some time in June or July, when we discontinued the shipment of tanker milk into New Jersey.

Q. Oh, you did discontinue selling bulk milk into New Jersey; and can you——

Mr. DANIELS: Into the area?

The WITNESS: Into the area.

By Mr. DURBIN:

Q. Yes; can you give me the exact date that you ceased to ship bulk milk into the New Jersey area?

A. I cannot.

Q. Can you give me the approximate date?

[176] A. It was some time in June or July.

Q. That was prior to the change in your method of doing business with Sylvan Seal, on July 1st, or was it at the same time that you were changing from one method of doing business to the other?

A. Well, I would say it was about the same time.

Q. You made a complete change in the operations of your business, effective as of July 1, 1957, in order to make yourself a handler under the Philadelphia order, did you not?

A. Oh, no. Oh, no.

Mr. DANIELS: Just a minute. Just a minute, Mr. Boger, please. I object. There is no testimony that he made a complete change in his type of business. If you want to take out the word "complete" change in his type of business—that's just part of his business.

Mr. DURBIN: I will remove the word "complete."

Mr. DANIELS: All right.

Then the question is did you do it in order to get under Order 61?

The WITNESS: We did not.

By Mr. DURBIN:

Q. The change which you made in your business, however, did result in your becoming subject to the Philadelphia order as of July 1, 1957, did it not?

A. Yes, it did.

[177] Q. Mr. Boger, are you acquainted with the Waddington plant at Belvedere?

Mr. DANIELS: What plant, sir?

Q. The Waddington plant at Belvedere.

A. No, I'm not.

Q. Are you acquainted with the Foremost plant at Delaware?

Mr. DANIELS: Delaware where, Delaware State, Delaware County?

Q. Delaware, New Jersey.

A. No, I am not.

Q. Do you purchase milk in competition with either one of those companies, that you know of?

A. No, I don't think we do.

Mr. DURBIN: That is all.

REDIRECT EXAMINATION.

By Mr. DANIELS:

Q. Mr. Boger, did you not sell packaged milk into what is now the extended area of New Jersey prior to the effective date of Order 27 as it now stands?

A. Yes.

Q. Didn't you sell about a million pounds a month, or was it a half million pounds a month, of packaged milk into what is now the extended area of Order 27?

A. I'd say about a half a million pounds.

[178] Q. A half a million pounds in packaged milk?

A. Yes.

Q. You had a health approval for the City of Philadelphia before July 1st of this year, didn't you?

A. Oh, yes.

Q. The only approval you didn't have was Lower Merion Township?

A. That's right.

Q. Mr. Boger, there has been some question raised when I referred to the proceedings in the United States District Court for Eastern Pennsylvania; were you not a subject and named as one of the defendants in an enforcement proceeding brought by the United States Department of Agriculture against you, an enforcement proceeding to make you comply with Order 27?

A. Yes.

Q. You were one of the defendants?

A. Yes.

Mr. DANIELS: I would like to stipulate in the record that wherever I have made reference to that I am speaking of that lawsuit. The number of the suit escapes me.

That is all.

Examiner BAIN: Any further cross?

Mr. DURBIN: I think we can agree with Colonel Daniels that when he refers to that lawsuit it is the suit of the United States against the Lehigh Valley Cooperative Farmers and [179] Suncrest, Inc., to enforce the provisions of Order 27, requiring them to file reports and make payments.

Examiner BAIN: Anything further from this witness?

Mr. DURBIN: Yes.

RECROSS-EXAMINATION.

By Mr. DURBIN:

Q. Mr. Boger, when you were answering Colonel Daniels' questions, and you said you had the approval, did you mean that the plant at Allentown had the health approval, or did you mean that the local farms had approval to ship into Philadelphia?

A. Well, we have had a health approval in Philadelphia for many years, the plant has had health approval there for many years.

Q. Then would you explain why you had to get the Lower Merion Township approval?

A. Yes, Sylvan Seal, the milk company, sells milk and ice cream in Lower Merion Township, which is Milk Control District No. 1, they call it. It covers about three townships there. And in order for us to ship milk or ice cream into them to sell in those—in that township, they'd have to have Lower Merion approval on our plant. And that approval, these farmers who shipped directly into Sylvan Seal could ship directly into there because those farms had not been individually approved, but not all of the farms shipping into our plant had been approved up until July 1st, so that we could not take milk directly out of [180] our plant and ship it into Sylvan Seal until all of our farms shipping milk into that plant were approved, and the plant also received complete approval.

Q. Does that approval apply only to milk which is received in your plant and then shipped into Sylvan Seal?

A. It applies—that approval applies to all milk, and we cannot—we cannot receive any other milk into our plant except it has Lower Merion approval.

Q. As a handler under the Philadelphia order, Order No. 61, did the Market Administrator for August of 1957 and September of 1957 allow you a credit, or the payment to producers at the Class III price?

Mr. DANIELS: Just a minute. Will you read that question to me, if the Hearing Officer please.

(Last question read.)

Mr. DURBIN: Instead of "producers," that should be "for payment into the New York pool at the Class III price."

Mr. DANIELS: Well, I don't know what you mean. I don't know whether the witness does. If he does, let him answer.

The WITNESS: I don't know what you mean either, Mr. Durbin.

• • • • •

[189] Q. Could you give us that, the bulk shipments into Philadelphia prior to July 1st?

A. I have—I haven't got those records with me.

Mr. DANIELS: You mean prior to——

Q. I mean, say, for June, 1957.

A. I haven't got those records with me.

Q. Could you give us any estimate of it?

Mr. DANIELS: Well, now, Mr. Durbin, do you mean from his plant, or direct from the farms, or both?

Q. I would like to have it broken down into direct from the farms and from your plant.

A. Well, prior to July 1st it was all direct from the farms that we shipped to Sylvan Seal.

• • • • •

[196] DIRECT EXAMINATION.

By Mr. DANIELS:

Q. Mr. Yohonic, state your full name and where you live.

A. Rudolph Peter Yohonic, Magnolia Drive, Easton, Pennsylvania.

Q. And your connection with the milk industry?

[197] A. Vice-president of Suncrest Farms.

Q. Are you also general manager?

A. Yes.

Q. For how long?

A. 12 years.

Q. Do you sell milk in the Easton-Allentown-Bethlehem and Phillipsburg, New Jersey, area?

A. Yes, sir.

Q. How long have you sold milk in the New Jersey area?

A. About 10 years.

Q. Do you come in competition with Lehigh Valley?

A. Yes, indeed.

Q. In Phillipsburg?

A. Yes, sir.

Q. Do you find them to be selling milk at cut rate prices?

A. That has never been my experience, to find Lehigh Valley doing anything that has been destructive in our area. If anything, they have been a very, very fine stabling effect, and this is not an admiration society, I think they are the first ones that will admit we are their keenest competitor.

Q. And is the Phillipsburg-Easton-Bethlehem-Allentown area one metropolitan area?

A. Yes, it has been ruled by a number of agencies that have done statistical work in that area.

[198] Q. Do you sell milk in New Jersey at the prices established by the Office of Milk Industry?

A. Yes, sir, we have adhered to that.

Q. And were you in the room when Mr. Boger was on the witness stand?

A. Yes, sir.

Q. You heard him testify that when they were not fixed by OMI, Office of Milk Industry for the State of New Jersey, he charged the Easton prices?

A. Yes, that has been the general policy of the dealers in that area.

Q. Is that what you charged?

A. Yes, sir.

Mr. Daniels: Cross-examination.

Cross-examination.

By Mr. Durbin:

Q. Mr. Yohonic, doesn't the plant of the Sunerest Farms, Inc., have health approval to ship into the marketing area as now defined under Order No. 27?

A. We have a New Jersey health approval, yes, sir.

Q. Is that from the State of New Jersey, or is it from some local health authority?

A. No, sir, it's from the State of New Jersey.

Mr. Durbin: Colonel, may I ask at this time that the answer to that question be copied into both of these records, [199] because I think it is material in both of these cases.

Mr. Daniels: I will be very glad to have that done. I think you asked him that yesterday,—I am not sure—but I would be glad to have it physically copied in, not by reference, if the Hearing Officer agrees.

Examiner Bain: That is agreeable to me. I think I know the way to do it when we get into the other record.

By Mr. Durbin:

Q. Now, on the state authority, is that the applicable health authority for approval?

A. In New Jersey?

Q. Yes.

A. To the best of my knowledge, it is. It comes from Trenton and from the Health Department.

Q. It governs the Phillipsburg area?

A. That's right, yes, sir.

Examiner BAIN: Off the record.

(Discussion off the record.)

Examiner BAIN: On the record.

Mr. DURBIN: That is all I have.

Examiner BAIN: Any redirect?

Mr. DANIELS: No redirect.

Examiner BAIN: Now, is it the whole testimony of Mr. Yohonic this afternoon that you want to be copied into the Suncrest Farms record, or just the questions on health?

[200] Mr. DANIELS: No, just on the health.

Examiner BAIN: That will be Mr. Durbin's cross-examination under health.

Do you have another witness, Colonel Daniels?

Mr. DANIELS: No.

I guess when we go back on the other record is the time when a request would be made that Mr. Durbin's cross-examination of Mr. Yohonic in this record be copied into the other, wouldn't it, rather than here?

Examiner BAIN: Yes, I can simply make a statement that that was done, and ask if there is any objection.

Are you ready for a recess now?

Mr. DANIELS: Yes, I am.

Examiner BAIN: Let's have a short recess.

(Recess had.)

Examiner BAIN: Please come to order.

Mr. DANIELS: The petitioner rests. I will ask to reopen my case unless Mr. Durbin introduces the reports that we filed, together with their corrections, for the months of August and September, 1957.

Mr. DURBIN: Well, the original report is already in evidence, having been put in when Mr. Boger was on the stand.

Mr. DANIELS: Oh, that's right, both of them.

Mr. DURBIN: Yes, for both months.

Now I am prepared to put into the record the corrected report [201] for August, 1957, and I herewith hand to the Presiding Officer four copies of such report.

Examiner BAIN: Any objections?

Mr. DANIELS: I haven't seen one yet, sir.

There is no objection.

Examiner BAIN: Admitted as Exhibit 10.

(Thereupon, the document above-referred to was marked Exhibit No. 10 in evidence.)

Mr. DURBIN: And I hand you herewith four copies of the report of the Lehigh Valley Cooperative Farmers for the month of September, 1957, as corrected by the Market Administrator for Order No. 27.

Mr. DANIELS: No objection.

Examiner BAIN: Admitted as Exhibit 11.

(Thereupon, the document above-referred to was marked Exhibit No. 11 in evidence.)

Mr. DURBIN: And then I also hand you four copies of the billing for the months of August and September, 1957, as sent out by the Market Administrator, after such reports were corrected, showing the amount that would be due,——

Mr. DANIELS: No objection.

Mr. DURBIN: —as based on those reports.

Mr. DANIELS: No objection.

Examiner BAIN: Admitted as Exhibit 12.

(Thereupon, the document above-referred to was marked Exhibit No. 12 in evidence.)

Examiner BAIN: Off the record.

[202] (Discussion off the record.)

Examiner BAIN: On the record.

Mr. DURBIN: If you Honor please, I hand you four copies of the announcement of minimum class prices for the month

of August, 1957, as issued by the Market Administrator for Order No. 27.

Examiner BAIN: Is it offered?

Any objections?

Mr. DANIELS: No objection.

Examiner BAIN: Admitted as Exhibit 13.

(Thereupon, the document above-referred to was marked Exhibit No. 13 in evidence.)

Mr. DURBIN: I now hand you four copies of the announcement of the uniform price for the month of August, 1957, as issued by the Market Administrator for Order No. 27.

Mr. DANIELS: No objection.

Examiner BAIN: Admitted as Exhibit 14.

(Thereupon, the document above-referred to was marked Exhibit No. 14 in evidence.)

Mr. DURBIN: And I now hand you four copies of the explanation of the uniform prices as announced, which accompanied the official announcement.

Mr. DANIELS: No objection.

Examiner BAIN: It is admitted as Exhibit No. 15.

(Thereupon, the document above-referred to was marked Exhibit No. 15 in evidence.)

Mr. DURBIN: That is for the month of August, 1957.

* * * * *

Form MA 1-8 Rev. 9-57

3311

LEHIGH VALLEY COOP. FARMERS M-6
ALLENTOWN,
PENNSYLVANIA

Ex

Is this plant regulated by another Federal Order under the Act?
No ☐ Yes ☒ Order No. 61 Area Phila.

## INSTRUCTIONS

### SCHEDULE A

After making tabulations and determining the classifications pursuant to the provisions for accounting as set forth in the Rules and Regulations issued by the Market Administrator show the required information on the upper part of the schedule. On the lower part of the schedule show the required information for opening inventories and receipts. Assign such opening inventories and receipts from all sources to the classification in the upper part of the schedule in accordance with the provisions of the Rules and Regulations. The total of each column on the line "TOTAL CLASSIFICATION" must equal the total of the same column on the line "TOTAL ASSIGNMENT."

### SCHEDULE B

In this schedule list in the detailed manner required all quantities of whole milk disposed of within the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

### SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment, the milk, milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule. The amount of payment required by the Marketing Order for such quantities of milk, butterfat, or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

TIME OF FILING AND OF MAKING PAYMENT

(SEE INSTRUCTIONS

RECD BY REGISTERED MAIL
MARKET ADMINISTRATOR
N.Y. MET. MILK MKTG. AREA

## SCHEDULE B—CLASS

Analysis of whole milk dispose

| SIZE OF UNIT | SALES AND SHIPMENTS NUMBER OF UNITS |
|---|---|
| One Gallon | 5,953 |
| Half Gallon | 44,427 |
| Quart—Paper | 233,475 |
| Quart—Glass | -0- |
| Pint—Paper | 4,483 |
| Pint—Glass | -0- |
| Half Pint | 19,787 |
| Third Quart | -0- |
| TOTAL QUARTS | |
| POUNDS (Multiply "Total Quarts" by 2.15) | |
| POUNDS-REMAINING MILK (See instructions) | |
| TOTAL WHOLE MILK POUNDS (Must equal "Tota ments" Class I-A S | |

## SCHEDULE C—COMPUTATION OF PAYM

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLA

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | C PR |
|---|---|---|---|
| From known non | I-A | 759,660 ✓ | $ |

3311

Form MA 1-8 Rev. 9-57

LEHIGH VALLEY COOP. FARMERS N-6
ALLENTOWN, -2
PENNSYLVANIA

EXHIBIT 10 MARKET ADMINISTRATOR

NEW YORK-NEW JERSEY MILK MARKETING AREA

PLANT REPORT Ex 10

Is this plant regulated by another Federal Order under the Act?
No ☐ Yes ☒ Order No. 61 Area Phila.

For Month of August 1957.

(SEE INSTRUCTIONS ON BACK PAGE)

RECD BY REGISTERED MAIL
MARKET ADMINISTRATOR
N.Y. MET. MILK MKTG. AREA

## SCHEDULE B—CLASS I-A WHOLE MILK

Analysis of whole milk disposed of in the Marketing Area

| SIZE OF UNIT | SALES AND SHIPMENTS NUMBER OF UNITS | FACTOR | QUART EQUIVALENT |
|---|---|---|---|
| One Gallon | 5,953 | × 4 | 23,812 ✓ |
| Half Gallon | 44,427 | × 2 | 88,854 ✓ |
| Quart—Paper | 233,475 | × 1 | 233,475 ✓ |
| Quart—Glass | -0- | × 1 | -0- |
| Pint—Paper | 4,483 | ÷ 2 | 2,242 ✓ |
| Pint—Glass | -0- | ÷ 2 | -0- |
| Half Pint | 19,787 | ÷ 4 | 4,947 ✓ |
| Third Quart | -0- | ÷ 3 | -0- |
| TOTAL QUARTS | | | 353,330 ✓ |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 759,660 ✓ |
| POUNDS-REMAINING MILK (See instructions) | | | -0- |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | | 759,660 ✓ |

Form 76-80

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non | I-A | 759,660 ✓ | $ 5.58 ✓ | $ ~~+.1559~~ | $ +.182 | $ 5.9179 | $ ~~44,955.92~~ |
| pool sources | II | | | -.01443 | | 5.74407 | 43,620.21 |
| LESS Credit | Sec. 927.83 | 759,660 | 3.089 | ~~+.2807~~ | +.182 | ~~3.5517~~ | ~~26,980.84~~ |
| | | | | -.03581 | +.85 Sub-total | 3.10313 | ~~17,975.08~~ |
| From sources not | I-A | | | | | | 20,046.77 |
| established | II | | | | | | |
| | | | | | Sub-total | | ~~17,975.08~~ |

NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING

o the provisions for account-
inistrator show the required
f the schedule show the re-
ch opening inventories and
the schedule in accordance
column on the line "TOTAL
e "TOTAL ASSIGNMENT."

hole milk disposed of within
s "TOTAL WHOLE MILK
listed as Class I-A on the
AINING MILK" is made up
ns, 20 quart cans, tanks, and
umber of units and the total
s plant are weighed and the
uded in the figure reported
tail on the attached tabula-
AINING MILK."

igned pursuant to the Rules
the milk, milk equivalent of
e. The amount of payment
, or skim milk must be com-
ich prescribe the rates for
Secs. 927.83 and 927.84.

IENT

or milk products are subject
d in time to reach the office
lowing the month for which
und computed on Schedule
the month for which this

# SCHEDULE A

## CLASSIFICATION

Prepare this schedule in terms of either milk pounds or butterfat pounds. However in all cases the pounds of whole milk classified Class I-A must be shown.

Tabulate in each column

Insert the

| List name of operator of Plant or other Establishment to which Milk or Milk Product was shipped (Other than in Route Sales) | Location of such Plant or other Establishment | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Whole Milk: Milk Pounds | Class I-A Whole Milk: Butterfat Pounds | Class | Class |
|---|---|---|---|---|---|---|---|---|---|
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | |
| ROUTE SALES | In the Marketing Area | Milk | 759,660 | 3.889874 | 29,549.824 | 759,660 | 29,549.824 | | |
| | | Cream | 21,296 | 5.075934 | 1,080.971 | | | | |
| | | Other Products | | | | | | | |
| ROUTE SALES | Outside the Marketing Area | Milk | 7,744,440 | 3.85728 | 298,725.167 | | | | |
| | | Cream | 474,054 | 7.41312 | 35,142.195 | | | | |
| | | Other Products | | | | | | | |
| SALES AND SHIPMENTS TO OTHERS | | | | | | | | | |
| S. A. Zimmerman N/A | Washington, N.J. | Raw Skim | 86 | .01 | .009 | | | | |
| S. A. Zimmerman N/A | Washington, N.J. | Past.Skim | 86 | .01 | .009 | | | | |
| S. A. Zimmerman | Washington, N.J. | Heavy Cream | 1,254 | 40. | 501.600 | | | | |
| Boonstra Dairy Sinemac DY | Paterson, N.J. | Buttermilk | 3,354 | 1.5 | 50.310 | | | | |
| Boonstra Dairy N/A | Paterson, N.J. | Past.Skim | 12,355 | .01 | 1.236 | | | | |
| Boonstra Dairy | Paterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | |
| Cornell Dairy | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | |
| Essex Creamery | Hillside, N.J. | Buttermilk | 172 | 1.5 | 2.580 | | | | |
| Carroccio & Son | Little York, N.J. | Medium Cream | 256 | 30. | 76.800 | | | | |
| Continental Creamery, Inc. | Easton, Pa. | Raw Skim | 26,352 | .01 | 2.635 | | | | |
| United Cheese Co. | Wind Gap, Pa. | Raw Skim | 91,584 | .01 | 9.158 | | | | |
| See Continuation Sheet | | | | | | | | | |
| TOTAL SALES AND SHIPMENTS | To Manufacture | | 4,160,071 | 4.89382 | 203,586.567 | | | | |
| ADD — CLOSING INVENTORIES | (Schedule Attached) | Milk | 314,734 | 3.85827 | 12,140.330 | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821.053 | | | | |
| | | Other Products | | | | | | | |
| TOTAL SALES, SHIPMENTS, and ON HAND | | | | | | | | | |
| ADD — PLANT LOSS (pursuant to the Rules and Regulations) | | | 393,936 | 1.33039 | 5,240.895 | | | | |
| REMAINING QUANTITIES (the disposition of which has not been established) | | | | | | | | | |
| TOTAL CLASSIFICATION | | | 17,173,859 | | 790,125.650 | 759,660 | 29,549.824 | | |

## ASSIGNMENTS

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| OPENING INVENTORIES | | Milk | 662,335 | 3.87534 | 25,667.737 | | | | |
| | | Cream | 520,740 | 36.05318 | 187,743.350 | | | | |
| | | Other Products | | | | | | | |
| RECEIPTS FROM OTHERS (List Name and Location) | | Name of Product | | | | | | | |
| Chippewa County Cooperative | Bloomer, Wis. | Cream | 68,410 | 40. | 27,364.000 | | | | |
| | | | | | | | | | |

3321

## SCHEDULE A

Prepare this schedule in terms of either milk pounds or butterfat pounds. However in all cases the pounds of whole milk classified Class I-A must be shown.

Tabulate in each column the milk pounds or butterfat pounds classified.

Insert the class at the head of each column.

| TION · other Establishment to ipped (Other than in | Location of such Plant or other Establishment | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Whole Milk: Milk Pounds | Class I-A Whole Milk: Butterfat Pounds | Class | Class | Class | Class | Skim Milk: Fluid Skim Differential Products | Skim Milk: Non Differential Disposition |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| | In the Marketing Area | Milk | 759,660 | 3.889874 | 29,549.824 | 759,660 | 29,549.824 | | | | | | |
| | | Cream | 21,296 | 5.075934 | 1,080.971 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| | Outside the Marketing Area | Milk | 7,744,440 | 3.85728 | 298,725.167 | | | | | | | | |
| | | Cream | 474,054 | 7.41312 | 35,142.195 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| O OTHERS | | | | | | | | | | | | | |
| n/a | Washington, N.J. | New Skim | 86 | .01 | .009 | | | | | | | | |
| n/a | Washington, N.J. | Past.Skim | 86 | .01 | .009 | | | | | | | | |
| | Washington, N.J. | Heavy Cream | 1,254 | 40. | 501.600 | | | | | | | | |
| n/a | Paterson, N.J. | Buttermilk | 3,354 | 1.5 | 50.310 | | | | | | | | |
| n/a | Paterson, N.J. | Past.Skim | 12,355 | .01 | 1.236 | | | | | | | | |
| | Paterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | | | | | |
| | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | | | | | |
| | Hillside, N.J. | Buttermilk | 172 | 1.5 | 2.580 | | | | | | | | |
| | Little York, N.J. | Medium Cream | 256 | 30. | 76.800 | | | | | | | | |
| Inc. | Easton, Pa. | New Skim | 26,352 | .01 | 2.635 | | | | | | | | |
| | Wind Gap, Pa. | New Skim | 91,584 | .01 | 9.158 | | | | | | | | |
| eet | | | | | | | | | | | | | |
| ENTS | To Manufacture | | 4,160,071 | 4.89382 | 203,586.567 | | | | | | | | |
| RIES | (Schedule Attached) | Milk | 314,734 | 3.85827 | 12,140.330 | | | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821.053 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| . and ON HAND | | | | | | | | | | | | | |
| et to the Rules and Regulations) | | | 393,936 | 1.33039 | 5,240.895 | | | | | | | | |
| (the disposition of which has not been established) | | | | | | | | | | | | | |
| | | | 17,173,859 | | 790,125.650 | 759,660 | 29,549.824 | | | | | | |

MARKET ADMINISTRATOR N.Y.-N.J. MILK MARKETING AREA RECEIVED OCT 7 1953 AM 7 8 9 10 11 12 1 2 3 4 5 6

ITS

| (List Name and Location) | | Milk | 662,335 | 3.87534 | 25,667.737 | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Cream | 520,740 | 36.05318 | 187,743.350 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| | | Name of Product | | | | | | | | | | | |
| rative | Bloomer, Wis. | Cream | 68,410 | 40. | 27,364.000 | | | | | | | | |
| | | | | | | | | | | | | | |
| | | | | | | | | | | | | | |

# 333A

August 1957

MANUFACTURING SCHEDULE

| Name of Product | Pounds | Butterfat Pounds |
|---|---|---|
| Plain Skim Condensed | 1,161,143 | 116.114 |
| Cottage Cheese | 2,146,068 | 15,932.344 |
| Skim Powder | 121,400 | 12.140 |
| Shake Mix | 18,670 | 1,182.481 |
| Ice Cream Mix | 707,000 | 186,342.975 |
| Sherbet | 5,130 | .513 |
| Totals | 4,160,071 | 203,586.567 |

SCHEDULE A - Continued

August 1957

SALES AND SHIPMENT TO OTHERS

| Name of Operator of Plant | Location | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class 1-A Whole Milk Milk Pounds | Class 1-A Whole Milk Butterfat Pounds |
|---|---|---|---|---|---|---|---|
| Sylvan Seal Milk Co. | Philadelphia,Pa. | Raw Milk | 2,789,015 | 3.49655 | 97,519.304 | | |
| Dietrich Dairy(Farmers Dairy) | Philadelphia,Pa. | Buttermilk | 1,806 | 1.5 | 27.090 | | |
| Hendricks Dairy | Perkasie, Pa. | Past.Skim | 4,666 | .01 | .467 | | |
| Kloss Supply Co. | Allentown, Pa. | Light Cream | 85 | 20. | 17.000 | | |
| Medri-Food Products,Inc. | Philadelphia,Pa. | Medium Cream | 20,594 | 30. | 6,178.200 | | |
| Kloss Supply Co. | Allentown, Pa. | Heavy Cream | 903 | 40. | 361.200 | | |
| Stocker Brothers | Easton, Pa. | Heavy Cream | 84 | 40. | 33.600 | | |

3344

SCHEDULE A - Continued

September 1957

SALES AND SHIPMENTS TO OTHERS

| Name of Operator of Plant | Location | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class 1-A Whole Milk Milk Pounds | Class 1-A Whole Milk Butterfat Pounds |
|---|---|---|---|---|---|---|---|
| Stocker Brothers | Easton, Pa. | Buttermilk | 172 | 1.5 | 2.580 | | |
| Stocker Brothers | Easton, Pa. | Heavy Cream | 920 | 40. | 368.000 | | |
| Hendricks Dairy | Perkasie, Pa. | Past.Skim | 2,765 | .01 | .277 | | |
| Kloss Supply Co. | Allentown, Pa. | Light Cream | 170 | 20. | 34.000 | | |
| Kloss Supply Co. | Allentown, Pa. | Heavy Cream | 820 | 40. | 331.200 | | |
| Reddi-Food Products Co. | Philadelphia, Pa. | Medium Cream | 18,652 | 30. | 5,595.600 | | |
| Kellers Creamery | Telford, Pa. | Sour Cream | 153 | 18. | 27.540 | | |
| Sylvan Seal Milk Co. | Philadelphia, Pa. | Raw Milk | 2,550,000 | 3.63539 | 92,702.445 ✓ | | |
| Dietrich Dairy | Philadelphia, Pa. | Buttermilk | 2,236 | 1.5 | 33.540 | | |
| H. Stilman Co. | Philadelphia, Pa. | Sour Cream | 341 | 18. | 61.380 | | |

2357A

## SCHEDULE B

In this schedule list in the detailed manner required all quantities of whole milk disposed of within the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

## SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment, the milk, milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule. The amount of payment required by the Marketing Order for such quantities of milk, butterfat, or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

### TIME OF FILING AND OF MAKING PAYMENT

If the operations of the plant covered by this report are such that milk or milk products are subject to payments under Secs. 927.83 and 927.84 this report should be filed in time to reach the office of the Market Administrator on or before the 10th of the month following the month for which this report is prepared. The obligation to the producer settlement fund computed on Schedule "C" must be paid on or before the 18th day of the month following the month for which this report is prepared. If the operations are such that there is no milk or milk product subject to payment under Secs. 927.83 or 927.84 this report should be filed on or before the 20th day of the month following the month for which this report is prepared.

Make checks payable to "Market Administrator."

Registered by

Date

RECEIVED BY REGISTERED MARKET ADMINISTRATOR N.Y. 17, N.Y.

| | | |
|---|---|---|
| Quart—Paper | 233,475 | × 1 |
| Quart—Glass | -0- | × 1 |
| Pint—Paper | 4,483 | ÷ 2 |
| Pint—Glass | -0- | ÷ 2 |
| Half Pint | 19,787 | ÷ 4 |
| Third Quart | -0- | ÷ 3 |
| TOTAL QUARTS | | |
| POUNDS (Multiply "Total Quarts" by 2.15) | | |
| POUNDS-REMAINING MILK (See instructions) | | |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | |

## SCHEDULE C—COMPUTATION OF PAYMENT T

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A A

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | B |
|---|---|---|---|---|
| From known non pool sources | I-A | 759,600 ✓ | $ 5.58 ✓ | $ |
| | II | | | |
| LESS Credit | Sec. 927.83 | 759,600 | 3.089 | |
| From sources not established | I-A | | | |
| | II | | | |

NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING

| DESCRIPTION | | POUNDS OF SKIM | RATE |
|---|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 20,331 | 1.874 |
| From sources not established | Not subject | | |
| TOTAL OBLIGATION (Payable on the 18th of the month following the month for which | | | |

This report properly signed must be submitted on or before the 10th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to

MARKET ADMINISTRATOR
205 East 42nd Street, New York 17, N. Y.

I, the und
is true an
Handler
Signed
Title

classified as Class I-A. The figure shown as "TOTAL WHOLE MILK he same as the sum of all whole milk quantities listed as Class I-A on the le "A." If the figure shown for "POUNDS-REMAINING MILK" is made up s in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and report a tabulation showing for each size unit number of units and the total event that any units of packaged milk leaving this plant are weighed and the ch units are recorded the pounds should be included in the figure reported NG MILK." The total of the pounds shown in detail on the attached tabula- gure shown on Schedule "B" as "POUNDS-REMAINING MILK."

or skim milk from other than pool sources is assigned pursuant to the Rules Class I-A, Class II, or skim subject to payment, the milk, milk equivalent of lk, so assigned must be reported in this schedule. The amount of payment eting Order for such quantities of milk, butterfat, or skim milk must be com- le. The applicable provisions of the Order which prescribe the rates for utation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

TIME OF FILING AND OF MAKING PAYMENT

e plant covered by this report are such that milk or milk products are subject cs. 927.83 and 927.84 this report should be filed in time to reach the office nistrator on or before the 10th of the month following the month for which d. The obligation to the producer settlement fund computed on Schedule or before the 18th day of the month following the month for which this the operations are such that there is no milk or milk product subject to pay- .83 or 927.84 this report should be filed on or before the 20th day of the nonth for which this report is prepared.

Make checks payable to "Market Administrator."

Date

| | | | |
|---|---|---|---|
| Pint—Paper | 4,483 | ÷ 2 | 2,242 |
| Pint—Glass | -0- | ÷ 2 | -0- |
| Half Pint | 19,787 | ÷ 4 | 4,947 |
| Third Quart | -0- | ÷ 3 | -0- |
| TOTAL QUARTS | | | 353,330 |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 759,660 |
| POUNDS-REMAINING MILK (See instructions) | | | -0- |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | | 759,660 |

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 759,660 | $ 5.581 | $ +.1559 | $ +.182 | $ 5.9179 | $ 44,955.92 |
| | II | | | -.01493 | | 5.14407 | 43,620.21 |
| LESS Credit | Sec 927.83 | 759,660 | 3.089 | +.2807 | +.182 | 3.5517 | 26,980.84 |
| | | | | -.03581 | +.85 | 3.0913 | 17,975.08 |
| | | | | | Sub-total | | 20,046.79 |
| From sources not established | I-A | | | | | | |
| | II | | | | | | |
| | | | | | Sub-total | | 17,975.08 |

NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING

| DESCRIPTION | | POUNDS OF SKIM | RATE | | TRANSPORTATION + or − | TOTAL RATE | |
|---|---|---|---|---|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 20,331 | 1.874 | | +.182 | 2.056 | 418.01 |
| From sources not established | Not subject | | | | | | |
| TOTAL OBLIGATION (Payable on the 18th of the month following the month for which this report is submitted) | | | | | | | $ 20,464.72 18,393.09 |

This report properly signed must be submitted on or before the 10th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to

MARKET ADMINISTRATOR
205 East 42nd Street, New York 17, N. Y.

I, the undersigned, hereby certify that the information given in this report is true and complete to the best of my knowledge, information and belief.

Handler's Name LEHIGH VALLEY COOPERATIVE FARMERS

Signed by George A. Hammer
(Person authorized to sign in behalf of handler)

Title Comptroller Date October 16, 1957

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| Boonstra Dairy | Paterson, N.J. | Buttermilk | 3,354 | 1.5 | 50.310 | | | | | | |
| Boonstra Dairy | Paterson, N.J. | Fast.Skim | 12,355 | .01 | 1.236 | | | | | | |
| Boonstra Dairy | Paterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | | | |
| Cornell Dairy | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | | | |
| Essex Creamery | Hillside, N.J. | Buttermilk | 172 | 1.5 | 2.580 | | | | | | |
| Carroccio & Son | Little York, N.J. | Medium Cream | 256 | 30. | 76.800 | | | | | | |
| Continental Creamery, Inc. | Easton, Pa. | Raw Skim | 26,352 | .01 | 2.635 | | | | | | |
| United Cheese Co. | Wind Gap, Pa. | Raw Skim | 91,584 | .01 | 9.150 | | | | | | |
| See Continuation Sheet | | | | | | | | | | | |
| **TOTAL SALES AND SHIPMENTS** | To Manufacture | | 4,100,071 | 4.86382 | 203,586.567 | | | | | | |
| **ADD — CLOSING INVENTORIES** | (Schedule Attached) | Milk | 314,734 | 3.85827 | 12,140.330 | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821,053 | | | | | | |
| | | Other Products | | | | | | | | | |
| **TOTAL SALES, SHIPMENTS, and ON HAND** | | | | | | | | | | | |
| **ADD — PLANT LOSS** (pursuant to the Rules and Regulations) | | | 393,936 | 1.33039 | 5,240.895 | | | | | | |
| **REMAINING QUANTITIES** (the disposition of which has not been established) | | | | | | | | | | | |
| **TOTAL CLASSIFICATION** | | | 17,173,859 | | 790,125.650 | 759.660 | 29.549.824 | | | | |

## ASSIGNMENTS

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **OPENING INVENTORIES** | | Milk | 662,335 | 3.87534 | 25,667.737 | | | | | | |
| | | Cream | 520,740 | 36.05318 | 187,743.350 | | | | | | |
| | | Other Products | | | | | | | | | |
| **RECEIPTS FROM OTHERS** (List Name and Location) | | Name of Product | | | | | | | | | |
| Chippewa County Cooperative | Bloomer, Wis. | Cream | 68,410 | 40. | 27,364,000 | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
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| | | | | | | | | | | | |
| | | | | | | | | | | | |
| | | | | | | | | | | | |
| **FROM DAIRY FARMERS AND OWN FARMS** | | | 15,922,374 | 3.45018 | 549,350,563 | | | | | | |
| **FROM SOURCES NOT ESTABLISHED** | | | | | | | | | | | |
| **TOTAL ASSIGNMENT** (Total pounds assigned for each class column must equal the total classification shown above for the same column) | | | 17,173,859 | | 790,125.650 | | | | | | |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Washington, N.J. | Cream | 1,254 | 40. | 501.600 | | | | | | | | |
| | Paterson, N.J. | Buttermilk | 3,354 | 1.5 | 50.310 | | | | | | | | |
| | Paterson, N.J. | Fast.Skim | 12,355 | .01 | 1.236 | | | | | | | | |
| | Paterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | | | | | |
| | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | | | | | |
| | Hillside, N.J. | Buttermilk | 172 | 1.5 | 2.580 | | | | | | | | |
| | Little York, N.J. | Medium Cream | 256 | 30. | 76.800 | | | | | | | | |
| | Easton, Pa. | New Skim | 26,352 | .01 | 2.635 | | | | | | | | |
| | Wind Gap, Pa. | New Skim | 91,584 | .01 | 9.158 | | | | | | | | |
| | | | | | | | | | | | | | |
| To Manufacture | | | 4,180,071 | 4.85382 | 203,586.567 | | | | | | | | |
| (Schedule Attached) | | Milk | 314,734 | 3.85827 | 12,140.330 | | | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821,053 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| HAND | | | | | | | | | | | | | |
| s and Regulations) | | | 393,936 | 1.33039 | 5,240.895 | | | | | | | | |
| on of which has not been established) | | | | | | | | | | | | | |
| | | | 17,173,859 | | 790,125,650 | 759,660 | 29,549,824 | | | | | | |

MARKET ADMINISTRATOR
N.Y.-N.J. MILK MARKETING AREA
RECEIVED
OCT 7 1953
AM
1,M,2,3,4,5,6,7,8,9,10,11,12,1,2,3,4,5,6,7,8,9,10,11

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Milk | 662,335 | 3.87534 | 25,667.737 | | | | | | | | |
| | | Cream | 520,740 | 36.05318 | 187,743,350 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| ed Location) | | Name of Product | | | | | | | | | | | |
| | Bloomer, Wis. | Cream | 68,410 | 40. | 27,364,000 | | | | | | | | |
| FARMS | | | 15,922,374 | 3.45018 | 549,350,563 | | | | | | | | |
| | | | | | | | | | | | | | |
| signed for each class columns must equal ation shown above for the same columns) | | | 17,173,859 | | 790,125.650 | | | | | | | | |

338A

September 1957

MANUFACTURING SCHEDULE

| Name of Product | Pounds | Butterfat Pounds |
|---|---|---|
| Plain Skim Condensed | 1,434,797 | 143.480 |
| Cottage Cheese | 2,218,369 | 17,224.332 |
| Skim Powder | 13,800 | 1.380 |
| Shake Mix | 29,738 | 1,839.906 |
| Ice Cream Mix | 599,978 | 151,136.095 |
| Totals | 4,296,682 | 170,345.793 |

MARKET ADMINISTRATOR
N.Y.-N.J. MILK MARKETING AREA
RECEIVED
OCT 17 1957
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

EXHIBIT 12

**MARKET ADMINISTRATOR**

FORM AS-3A
REV. (8157)

**NEW YORK -- NEW JERSEY MILK MARKETING AREA**

205 EAST 42ND STREET, NEW YORK 17, NEW YORK
ORegon 9-1100

## PRODUCER SETTLEMENT FUND

STATEMENT OF HANDLER'S ACCOUNT

To. LEHIGH VALLEY COOPERATIVE FARMERS
1100-1160 N. 7TH STREET
ALLENTOWN, PENNSYLVANIA

Date OCT 18 1957

| DATE | NET POOL OBLIGATION | | VALUE AT PUBLISHED UNIFORM PRICE | DEBIT | CREDIT | BALANCE |
|---|---|---|---|---|---|---|
| | WHOLE MILK LBS. | VALUE | | | | |
| | | | | Balance Brought Forward | | |
| 10-18 | AUG. 1957 NON-POOL PRODUCTS | | | 2046498 | | |
| 10-18 | SEP. 1957 NON-POOL PRODUCTS | | | 1897905 | | 3944403 |

U.S. DEPARTMENT OF AGRICULTURE
1946
Docket 27733 Exhibit No. 12
Date 10-24-57
Reporter
ALDERSON REPORTING COMPANY

Full payment of any debit balance on this account must be made on or before the 18th day of each month

EXHIBIT 13

**MARKET ADMINISTRATOR**

**NEW YORK – NEW JERSEY MILK MARKETING AREA**

505 EAST 42ND STREET, NEW YORK 17, NEW YORK

OREGON 9-1100

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL PURSUANT TO SECTION 927.46 (b)

August 1957

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $5.58 | $ .04 |
| I-B | 5.58 | .04 |
| II | 3.870 | .094 |
| III | 3.089 | .072 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL | 1.874 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT | .058 |

NEARBY DIFFERENTIAL RATE-
AS SPECIFIED IN PERCENTAGE UTILIZATION COLUMN 55 AND OVER, BUT UNDER 60

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .60699 |
| Average of Prices at midwestern condenseries | 3.062 |
| Per Pound average Wisconsin State Brand Cheddar f.o.b. Wisconsin Assembly points | .35062 |
| **Non Fat Dry Milk Solids** | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots, bags or barrels" | .14000 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area | |
| Spray Process | .15280 |
| Roller Process | .13270 |
| Weighted average of Spray and Roller prices | .13873 |

September 5, 1957

C. J. Blanford
Market Administrator

# 341A

EXHIBIT 14
MARKET ADMINISTRATOR
NEW YORK – NEW JERSEY MILK MARKETING AREA
205 EAST 42ND STREET, NEW YORK 17, NEW YORK
ORegon 9-1100

## ANNOUNCEMENT OF UNIFORM PRICE
## AUGUST 1957 $4.68 PER HUNDREDWEIGHT

BUTTERFAT DIFFERENTIAL: $.058
WEIGHTED AVERAGE BUTTERFAT TEST: 3.59805%

| CLASS | AND NAME OF PRODUCT | MILK POUNDS | PERCENT OF MILK | CLASS PRICES | TOTAL VALUE 1/ |
|---|---|---|---|---|---|
| I-A | Fluid Milk Marketing Area | 460,930,739 | 62.73 | $5.58 | $26,130,646.92 |
| I-B | Fluid Outside Marketing Area | 7,592,085 | 1.03 | 5.58 | 433,019.43 |
| II | Total Class II | 42,012,729 | 5.72 | 3.870 | 1,641,193.09 |
| III | Total Class III | 224,281,244 | 30.52 | 3.089 | 7,030,962.04 |
| | | 734,816,797 | 100.00 | | 35,235,821.48 |
| LESS: | Milk from unrevealed sources | 39,949 | | | |
| | Reported receipts from prod. | 734,776,848 | | | |
| ADD: | Fluid Skim Diff. Value | 8,057,882 | | 1.874 | 152,911.81 |
| | | | | | 35,388,733.29 |
| | ADJUSTMENTS | | | | |
| LESS: | B/F in excess of 3.5% | | 417,851.01 | | |
| | Freight Adj. to 201-210 mile zone | | 62,400.97 | | |
| | Nearby Differential | | 391,571.38 | | |
| | Butter | 10,484,926 | 11,230.36 | | |
| | Cheddar Cheese | 2,725,342 | 2,711.24 | | 885,764.96 |
| | | | | | 34,502,968.33 |
| LESS: | Cooperative Assn. payments | | | | 150,059.70 |
| | | | | | 34,352,908.63 |
| ADD: | Payments Required Pursuant to Section 927.83 | | | | 4,478.81 |
| | | | | | 34,357,387.44 |
| ADD: | Cash in Prod. Settlement Fund | | | | 621,048.56 |
| | | | | | 34,978,436.00 |
| LESS: | Reserve | | | | 590,879.51 |
| | | | | | 34,387,556.49 |

734,776,848 lbs. of pooled milk at uniform price of $4.68 per cwt.
1/ Includes class price, butterfat and freight differential values.

(Lists referred to in Sections 927.29(f) and 927.43 are available upon request.)

U.S. DEPARTMENT OF AGRICULTURE
AAA
Docket 12-123 Exhibit No. 14
Date 11-24-57
Reporter
ALDERSON REPORTING COMPANY

Dated September 14, 1957

C. J. Blanford
Market Administrator

342A

MARKET ADMINISTRATOR
New York-New Jersey Milk Marketing Area
205 East 42nd Street, New York 17, N. Y.
OXegon 9-1100

EXHIBIT 15

FOR IMMEDIATE RELEASE:
SATURDAY, SEPTEMBER 14, 1957

# FARM MILK PRICE FOR AUGUST SET AT $4.68

---

New York, Sept. 14---A uniform farm price of $4.68 per hundredweight (46.5 quarts) will be paid to dairy farmers who supplied the New York-New Jersey milk marketing area in August, it was announced today by Dr. C. J. Blanford, the administrator.

The producer butterfat differential for the month was announced at 5.8 cents for each tenth of a pound of fat above or below the 3.5 percent standard.

The New York-New Jersey milk marketing area came into existence August 1 and includes Metropolitan New York, a large area of Upstate New York and Northern New Jersey. The former New York metropolitan milk marketing area included only New York City and Nassau, Suffolk and Westchester Counties. The new area is regulated by marketing orders issued by the United States Department of Agriculture and by the state agriculture departments of New York and New Jersey.

Dr. Blanford said the August uniform price of $4.68 per hundredweight compared with $4.09 for July, the last price to be computed under the former marketing orders. The price in August, 1956, was $4.26 per hundredweight.

August production in the New York-New Jersey milkshed amounted to 734,776,848 pounds, the Administrator reported. July's production was 673,966,364 pounds and in August, 1956, it totaled 605,109,612 pounds. There were 53,378 dairy farmers in the August pool. There were 43,724 in the July pool and 46,536 in August of last year. Production per day, per dairy for August was 444 pounds. It was 497 pounds in July and 419 pounds in August, 1956.

Of the total production in August, 468,522,824 pounds were utilized in Class I, fluid milk. Total Class I under the old orders in July was 332,562,726 pounds, while in August, 1956, it amounted to 334,684,629 pounds.

August reports to the Administrator were submitted by 494 handlers, compared with 128 in July.

Total farm value of the August milk production was $35,196,978.88, Dr. Blanford reported.

The August uniform price of $4.68 per hundredweight will be paid for milk testing 3.5 percent butterfat and received at plants 201-210 miles from New York City.

-30-

[222] Q. Dr. Pollard, at that point you are assuming that the producers who delivered into Philadelphia continued to make delivery direct from the farm into the Philadelphia market?

A. That was the basis for the assumption of eliminating those producers from the total list submitted by Lehigh Valley.

Q. In the event of that assumption, their deductions would not be a receipt at the Lehigh Valley plant at Allentown; is that right?

A. That is correct.

Q. Now, proceed.

A. On the right-hand pages, or the right-hand sides of the page of each of these exhibits, towards the bottom, is a figure called "total pool obligation." It shows up on each of the exhibits as such, which showed the figure which would have been used in the computation of the uniform price by [223] this office.

After the computation of the uniform price the Market Administrator computes the credit which is allowed the handler, based on the volume of milk at the plant, multiplied by the basic uniform prices.

I have made those calculations. They don't show up on your figures, but I can give you the results of those computations that, had the handler operated in this way, he would have obtained a credit from the pool, that means a payment from the pool to the handler, of the following amount: for August, the credit would have been $23,020.27; and for September the credit to the handler would have been $39,537.68.

Q. And that amount, as you have just stated, Dr. Pollard, would be in lieu of the $39,444.03 which was billed them under the compensatory payment provisions?

A. That is correct. That is, paying compensatory payments, they were required to make a payment to the pool. Had they been pooled on this basis, the pool would have paid money to them.

Q. Dr. Pollard, these figures are made on the assumption that the account with Sylvan Seal is not lost but is merely being served in the way it was served prior to the change in business of Lehigh Valley as of July 1, 1957?

A. It's made on the basis that that milk was shipped directly to the Sylvan Seal, instead of being handled through [224] their plant.

Q. Who is "their plant"?

A. I mean their plant at Allentown, Pennsylvania.

Mr. DURBIN: That is all.

CROSS-EXAMINATION.

By Mr. DANIELS:

Q. Dr. Pollard, looking at Exhibit 19, what figure did you subtract from $591,620.93 to come up with the figure of $23,020.20?

A. The figure that I came up with, the figure at the uniform price for the volume of milk that I show here, was $614,641.20, which is greater than the net pool obligation of $591,620.93.

Q. What did you say the figure $614,640.20 represents?

A. That's the value of 13,133,359.

Q. Pounds?

A. Pounds, at the basic uniform price of $4.68.

Mr. DURBIN: Taking into account the various differentials to which they had been put; is that correct, credited?

The WITNESS: The differentials to which they would have been credited, were entitled, were taken into account before arriving at the total pool obligation, which means that when you compare the two prices all you have to do is to multiply the volume of milk times the basic uniform price announced for the 201-210-mile zone.

[225] Mr. DURBIN: Dr. Pollard, will you state what those differentials are?

Mr. DANIELS: Are you taking the witness back?

Mr. DURBIN: Yes.

Mr. DANIELS: Well, go right ahead.

The WITNESS: The differentials applying to that plant that were used in the August report were a plus differential for transportation of 18 3/10 cents, and an estimated nearby differential of 21 9/10 cents, and a minus butterfat differential of 3.461 cents.

Mr. DANIELS: Are you through, Mr. Durbin?

Mr. DURBIN: Yes.

By Mr. DANIELS:

Q. How many miles from the arc did you figure the plant?

A. I believe that's 75 miles. In the 71-75-mile zone.

Q. That would be 75 miles from his plant to where?

A. It's the nearest point. I don't recall which one that was at this time.

Q. Well, I mean how did you come to that distance?

A. I used—I computed that distance, and this was done for purposes of this hearing, but at the time that plant zones were computed and announced last August, they were computed in accordance with the method established in the order, that is, computed by use of the specified guide.

[226] Q. What was the same figure on Exhibit 20 that you used in connection with $596,760.29 to come out to the figure $39,537.68?

A. I presume by the "same figure" you mean the credit that the handler gets at the uniform price?

Q. I don't mean anything, I just mean the figure that you used in order to arrive at $39,537.68.

A. It's—excuse me, I just didn't understand which one you were talking about. Well, that is the——

Q. Well, pardon me if I seem to be abrupt.

A. That is the volume of 12,650,059 pounds at the uniform price of $5.03. And that value is $639,297.97.

Q. What Class I-A utilization did you apply to Lehigh Valley, what percentage of his milk was used in Class I-A in order to arrive at his pool obligation?

A. The figures are shown on here. I didn't use a percentage, I used volumes of milk.

Q. How did his percentage of Class I-A compare with the market's percentage of Class I-A?

A. I haven't made that computation.

Q. Will you, please. That will make a difference, will it not?

A. Make a difference in what? I don't understand that question.

## INSTRUCTIONS

### SCHEDULE A

After making tabulations and determining the classifications pursuant to the provisions for accounting as set forth in the Rules and Regulations issued by the Market Administrator show the required information on the upper part of the schedule. On the lower part of the schedule show the required information for opening inventories and receipts. Assign such opening inventories and receipts from all sources to the classification in the upper part of the schedule in accordance with the provisions of the Rules and Regulations. The total of each column on the line "TOTAL CLASSIFICATION" must equal the total of the same column on the line "TOTAL ASSIGNMENT."

### SCHEDULE B

In this schedule list in the detailed manner required all quantities of whole milk disposed of within the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

### SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment, the milk, milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule. The amount of payment required by the Marketing Order for such quantities of milk, butterfat, or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

### TIME OF FILING AND OF MAKING PAYMENT

If the operations of the plant covered by this report are such that milk or milk products are subject to payments under Secs. 927.83 and 927.84 this report should be filed in time to reach the office of the Market Administrator on or before the 10th of the month following the month for which this report is prepared. The obligation to the producer settlement fund computed on Schedule

Form MA 1-8 Rev. 9-57

335A

LEHIGH VALLEY COOP. FARMERS N-6
ALLENTOWN, -8
PENNSYLVANIA

Exhibit 11

NEW YO

Is this plant regulated by another Federal Order under the Act?
No ☐ Yes ☒ Order No. 61 Area. Phila.

For Mont

(SEE INSTRUCTIONS ON BACK

RE D Y REGISTERED MAIL
MARKET ADMINISTRATOR
N.Y. MET. MILK MKTG. AREA

### SCHEDULE B—CLASS I-A W

Analysis of whole milk disposed of in the

| SIZE OF UNIT | SALES AND SHIPMENTS NUMBER OF UNITS | FACTO |
|---|---|---|
| One Gallon | 5,239 | × 4 |
| Half Gallon | 42,992 | × 2 |
| Quart—Paper | 202,219 | × 1 |
| Quart—Glass | -0- | × 1 |
| Pint—Paper | 3,582 | ÷ 2 |
| Pint—Glass | -0- | ÷ 2 |
| Half Pint | 17,003 | ÷ 4 |
| Third Quart | -0- | ÷ 3 |
| TOTAL QUARTS | | |
| POUNDS (Multiply "Total Quarts" by 2.15) | | |
| POUNDS-REMAINING MILK (See instructions) | | |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | |

### SCHEDULE C—COMPUTATION OF PAYMENT TO

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AN

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | BU |
|---|---|---|---|---|
| From known non pool sources | I-A | 677,682 | $ 5.83 | $ + |
| | II | | | ( ) |
| LESS Credit | Sec. 927.83 | 677,682 | 3.172 | + |
| From sources not established | I-A | | | |
| | II | | | |

## INSTRUCTIONS

nd determining the classifications pursuant to the provisions for account-
s and Regulations issued by the Market Administrator show the required
part of the schedule. On the lower part of the schedule show the re-
ening inventories and receipts. Assign such opening inventories and
to the classification in the upper part of the schedule in accordance
Rules and Regulations. The total of each column on the line "TOTAL
equal the total of the same column on the line "TOTAL ASSIGNMENT."

detailed manner required all quantities of whole milk disposed of within
sified as Class I-A. The figure shown as "TOTAL WHOLE MILK
me as the sum of all whole milk quantities listed as Class I-A on the
." If the figure shown for "POUNDS-REMAINING MILK" is made up
nits of various sizes for example, 40 quart cans, 20 quart cans, tanks, and
rt a tabulation showing for each size unit number of units and the total
t that any units of packaged milk leaving this plant are weighed and the
nits are recorded the pounds should be included in the figure reported
MILK." The total of the pounds shown in detail on the attached tabula-
shown on Schedule "B" as "POUNDS-REMAINING MILK."

im milk from other than pool sources is assigned pursuant to the Rules
I-A, Class II, or skim subject to payment, the milk, milk equivalent of
assigned must be reported in this schedule. The amount of payment
Order for such quantities of milk, butterfat, or skim milk must be com-
he applicable provisions of the Order which prescribe the rates for
on of the credit if applicable are set forth in Secs. 927.83 and 927.84.

E OF FILING AND OF MAKING PAYMENT

nt covered by this report are such that milk or milk products are subject
27.83 and 927.84 this report should be filed in time to reach the office
tor on or before the 10th of the month following the month for which
e obligation to the producer settlement fund computed on Schedule

Form MA 1-B Rev. 9-57

3351

LEHIGH VALLEY COOP. FARMERS N-6
ALLENTOWN, -8
PENNSYLVANIA

Is this plant regulated by another Federal Order under the Act?
No ☐ Yes ☒ Order No. 61 Area. Phila.

EXHIBIT 11

MARKET ADMINISTRATOR LATE
NEW YORK-NEW JERSEY MILK MARKETING AREA
PLANT REPORT Ex 11
For Month of September 1957

(SEE INSTRUCTIONS ON BACK PAGE)

"RE D Y REGISTERED MAIL
MARKET ADMINISTRATOR
N.Y. MET. MILK MKTG. AREA

### SCHEDULE B—CLASS I-A WHOLE MILK

Analysis of whole milk disposed of in the Marketing Area

| SIZE OF UNIT | SALES AND SHIPMENTS NUMBER OF UNITS | FACTOR | QUART EQUIVALENT |
|---|---|---|---|
| One Gallon | 5,239 | × 4 | 20,956 ✓ |
| Half Gallon | 42,992 | × 2 | 85,984 ✓ |
| Quart—Paper | 202,219 | × 1 | 202,219 ✓ |
| Quart—Glass | -0- | × 1 | -0- |
| Pint—Paper | 3,582 | ÷ 2 | 1,791 |
| Pint—Glass | -0- | ÷ 2 | -0- |
| Half Pint | 17,003 | ÷ 4 | 4,251 ✓ |
| Third Quart | -0- | ÷ 3 | -0- |
| TOTAL QUARTS | | | 315,201 ✓ |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 677,682 ✓ |
| POUNDS-REMAINING MILK (See instructions) | | | |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | | 677,682 ✓ |

Zone 76-80

### SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 677,682 | $ 5.83 | $ +.1559 | $ +.182 | $ 6.1679 | $ 41,798.75 |
| | II | | | | | | |
| LESS Credit | Sec. 927.83 | 677,682 | 3.172 | +.2885 | +.182 | 3.6425 | 24,684.57 |
| | | | | | Sub-total | | 17,114.18 |
| From sources not established | I-A | | | | | | 15,730.19 |
| | II | | | | | | |

## CLASSIFICATION

Prepare this schedule in terms of either milk pounds or butterfat pounds. However in all cases the pounds of whole milk classified Class I-A must be shown.

## SCHEDULE A

Tabulate in each column the milk p

Insert the class at the

| List name of operator of Plant or other Establishment to which Milk or Milk Product was shipped (Other than in Route Sales) | Location of such Plant or other Establishment | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Whole Milk | | Class | Class |
|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Milk Pounds | Butterfat Pounds | | |
| 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |
| ROUTE SALES | In the Marketing Area | Milk | 677,682 | 3.88988 | 26,361.072 | 677,682 | 26,361.072 | | |
| | | Cream | 19,280 | 4.88427 | 941.688 | | | | |
| | | Other Products | | | | | | | |
| ROUTE SALES | Outside the Marketing Area | Milk | 7,097,745 | 3.87378 | 274,951.388 | | | | |
| | | Cream | 410,941 | 7.01207 | 28,815.484 | | | | |
| | | Other Products | | | | | | | |
| SALES AND SHIPMENTS TO OTHERS | | | | | | | | | |
| Bocnstra Dairy Sicomac Dy | Paterson, N.J. | Buttermilk | 1,806 | 1.5 | 27.090 | | | | |
| Bocnstra Dairy | Paterson, N.J. | Fast.Skim | 3,024 | .01 | .302 | | | | |
| Cornell Dairy | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | |
| Essex Creamery | Hillside, N.J. | Buttermilk | 86 | 1.5 | 1.290 | | | | |
| S. A. Zimmerman | Washington, N.J. | Fast.Skim | 173 | .01 | .017 | | | | |
| S. A. Zimmerman | Washington, N.J. | Heavy Cream | 1,003 | 40. | 401.200 | | | | |
| Bocnstra Dairy | Patterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | |
| Continental Creamery | Easton, Pa. | Fast.Skim | 14,861 | .01 | 1.486 | | | | |
| Continental Creamery | Easton, Pa. | Medium Cream | 338 | 30. | 101.400 | | | | |
| United Cheese Co. | Wind Gap, Pa. | Raw Skim | 22,896 | .01 | 2.290 | | | | |
| Continental Creamery | Easton, Pa. | Buttermilk | 430 | 1.5 | 5.450 | | | | |
| See Continuation Sheet | | | | | | | | | |
| TOTAL SALES AND SHIPMENTS To Manufacture | | | 4,296,682 | 3.96458 | 170,345.793 | | | | |
| ADD—CLOSING INVENTORIES (See Attached Schedule) | | Milk | 599,853 | 3.87804 | 23,262.596 | | | | |
| | | Cream | 254,517 | 36.04663 | 91,744.812 | | | | |
| | | Other Products | | | | | | | |
| TOTAL SALES, SHIPMENTS, and ON HAND | | | | | | | | | |
| ADD—PLANT LOSS (pursuant to the Rules and Regulations) | | | 494,984 | 5.63026 | 24,869.912 | | | | |
| REMAINING QUANTITIES (the disposition of which has not been established) | | | | | | | | | |
| TOTAL CLASSIFICATION | | | 16,475,283 | | 741,047.282 | 677,682 | 26,361.072 | | |

## ASSIGNMENTS

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| OPENING INVENTORIES | Milk | 314,734 | 3.85827 | 12,140.330 | | | | |
| | Cream | 350,803 | 28.45501 | 99,821.053 | | | | |
| | Other Products | | | | | | | |
| | Name of | | | | | | | |

3364

Prepare this schedule in terms of either milk pounds or butterfat pounds. However in all cases the pounds of whole milk classified Class I-A must be shown.

## SCHEDULE A

Tabulate in each column the milk pounds or butterfat pounds classified.
Insert the class at the head of each column.

| ...hment to ...r than in | Location of such Plant or other Establishment | Product Sold or Shipped | Pounds Milk or Product | Average Butterfat Test | Pounds of Butterfat | Class I-A Whole Milk | | Class | Class | Class | Class | Skim Milk | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | | Milk Pounds | Butterfat Pounds | | | | | Fluid Skim Differential Products | Non Differential Disposition |
| | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 |
| | In the Marketing Area | Milk | 677,682 | 3.88988 | 26,361.072 | 677,682 | 26,361.072 | | | | | | |
| | | Cream | 19,280 | 4.88427 | 941.688 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| | Outside the Marketing Area | Milk | 7,097,745 | 3.87378 | 274,951.388 | | | | | | | | |
| | | Cream | 410,941 | 7.01207 | 28,815.484 | | | | | | | | |
| | | Other Products | | | | | | | | | | | 1 |
| | | | | | | | | | | | | | |
| / | Paterson, N.J. | Buttermilk | 1,806 | 1.5 | 27.090 | | | | | | | | |
| | Paterson, N.J. | Past.Skim | 3,024 | .01 | .302 | | | | | | | | |
| | New Market, N.J. | Buttermilk | 2,150 | 1.5 | 32.250 | | | | | | | | |
| | Hillside, N.J. | Buttermilk | 86 | 1.5 | 1.290 | | | | | | | | |
| | Washington, N.J. | Past.Skim | 173 | .01 | .017 | | | | | | | | |
| | Washington, N.J. | Heavy Cream | 1,003 | 40. | 401.200 | | | | | | | | |
| | Patterson, N.J. | Heavy Cream | 63 | 40. | 25.200 | | | | | | | | |
| | Easton, Pa. | Past.Skim | 14,861 | .01 | 1.486 | | | | | | | | |
| | Easton, Pa. | Medium Cream | 338 | 30. | 101.400 | | | | | | | | |
| | Wind Gap, Pa. | Raw Skim | 22,896 | .01 | 2.290 | | | | | | | | |
| | Easton, Pa. | Buttermilk | 430 | 1.5 | 5.450 | | | | | | | | |
| | | | | | | | | | | | | | |
| | To Manufacture | | 4,296,682 | 3.96458 | 170,345.793 | | | | | | | | |
| | ...ee Attached Schedule) | Milk | 599,853 | 3.87804 | 23,262.596 | | | | | | | | |
| | | Cream | 254,517 | 36.04663 | 91,744.812 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| | HAND | | | | | | | | | | | | |
| | ...and Regulations) | | 494,984 | 5.63026 | 24,868.912 | | | | | | | | |
| | ...n of which has not been established) | | | | | | | | | | | | |
| | | | 16,475,283 | | 741,047.282 | 677,682 | 26,361.072 | | | | | | |
| | | Milk | 314,734 | 3.85827 | 12,140.330 | | | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821.053 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| | | Name of | | | | | | | | | | | |

MARKET ADMINISTRATOR
N.Y.-N.J. MILK MARKETING AREA
RECEIVED
OCT 17 1957
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

Q. What did you say?

[227] A. I say I don't understand your question, in what difference that will make.

Q. Well, if the percentage of milk used in Class I-A determines the pool obligation of any handler—It does, does it not?

A. No, no, it's not——

Q. The percentages in the various classes?

A. It's percentages in all of the classes. Of course as far as the obligation goes, as far as Class I is concerned, I-A and I-B are equal as far as price is concerned.

Q. Yes, that's right.

A. And in his case the—his greatest obligation is on Class I-B.

Q. Well, then I will amend my question to ask you if you can calculate for me his percentage of total receipts that were disposed of in Class I-A and Class I-B?

Mr. DURBIN: I don't believe, if your Honor please, that that is the way you compute the obligation to the pool.

Examiner BAIN: Well, perhaps we had better start over and explain all these figures on this proposed exhibit. Some of them are plain, but some of them are not, to me.

Mr. DANIELS: May we go off the record?

Examiner BAIN: Off the record.

(Discussion off the record.)

Examiner BAIN: On the record.

[228] Let's have a short recess.

(Recess had.)

Examiner BAIN: Please come to order.

Mr. DANIELS: I am cross-examining Dr. Pollard.

By Mr. DANIELS:

Q. Dr. Pollard, in Exhibits 19 and 20 you did not at all use the actual operation of Lehigh Valley for the months of August or September, did you?

A. Well, it's all their operation, except for the elimination of the milk going to Philadelphia.

Q. Well, the answer to my question, then, is that you didn't use their actual operation for the months of August and September, did you?

A. If you mean did I receive all of the milk received at that plant, I did not. I think it's clear on that.

Q. All right, you did not use all of the farmers that shipped milk to the Lehigh Valley Cooperative, did you?

A. Mr. Daniels, when it comes to the farmers, farmers play a very small part in this.

Q. Mr. Pollard——

A. They pay—let me explain——

Q. Well, I asked you the question, and you answer it yes or no, and then explain it. You did not use all of the farmers that shipped to Lehigh Valley, did you?

A. Well, there is no yes or no answer to that. I didn't [229] use farmers at all, I used receipts from farmers, and I did not use all of the receipts from farmers that were shown on the Lehigh Valley report to us.

Q. But on Exhibit 19 you use the figure 800 farmers. Now, the petitioner has more than 800 farmers shipping milk to it, and you know that; isn't that so?

A. Their March list that I used showed something more than 900 farmers.

Mr. DANIELS: Now, Mr. Lent, if you want to testify will you take the witness stand, please, so I may cross-examine you.

Mr. LENT: I didn't speak loud enough for any one to hear.

Mr. DANIELS: Yes, you spoke loud enough for anybody in the room to hear.

By Mr. DANIELS:

Q. Now, Dr. Pollard, the results of Exhibits 19 and 20, you do not pretend that that would be the result for a year's operation, do you?

A. This is the result for this one month. I have some ideas for what the year's operation would be, based on these, if you would like to hear them.

Q. It is the result for two months, isn't it?

A. Two months, that's right.

Q. With the qualifications that you have stated in direct [230] and cross-examination?

A. Yes.

Q. In order for Exhibits 19 and 20 to be valid as to what would happen, this petitioner would have to change his type of business from the way he conducted it in August and September quite substantially, would he not?

A. I don't know what you mean by substantially. It doesn't appear so to me.

Q. Well, if his milk that is sold to Sylvan Seal went through his plant by being taken out of the tank and put in a holding tank, and then put back in, then you would have to have used all of his milk, would you not, in your calculations, for it to have any validity?

A. No.

Q. Why not?

A. Because it was on the basis that he did not do that.

Q. I am saying if he did that, then you would have to use all of the milk in your calculation? If all the milk that went to Sylvan Seal was taken to his plant and drawn out of the tanks, and brought in and put in holding tanks, and other milk put in holding tanks and sent down to Sylvan Seal, then you would have had to change your calculation by including that milk?

A. You mean if I—my calculations would be different if I had included the milk going to Philadelphia in the [231] classifications shown here?

Q. Yes.

A. The results would have been different?

Q. Yes.

A. That's correct.

Incidentally, I did that for the month of August, and found that the credit coming to him from the pool would have been $11,000, instead of $23,000.

Q. The figures that appear on Exhibit 19 and Exhibit 20, are based on an assumed operation which differs from

the actual operation of the petitioner for these months—I am dropping the word substantial; is that not right?

A. That's correct.

Q. That amounts to a substitution of your business judgment for the petitioner's business judgment, doesn't it?

A. Well, I'm sorry if you have concluded that I am trying to establish the—what should be the business judgment of your client. I was merely trying to show, at the request of the government's lawyers, what would have been the effect if this had taken place.

* * * * *

[234] Q. What would be the administrative assessment, or what would have been the administrative assessment for this dealer had he been a pool plant in August and September of 1957?

A. The administration assessment for August and September was two cents per hundredweight, which I believe is exactly the same as the administration assessment under the Philadelphia order.

Q. Just tell me how much it would have been in dollars, would you please?

[235] A. If——

Q. In Exhibit 19.

A. The administration assessment based on this volume of milk would be $2,626, and I believe that is 67 cents, 69 cents. For September it would have been $2,530.01.

Q. Will you tell me how you made the calculation to arrive at $11,000 credit that the petitioner would receive had all of the milk that went to Sylvan Seal gone through the plant in August?

A. In August I took the volume of milk——

Q. I mean do you have the figures?

A. No, I do not. But I can tell you how I did it. I took the volume of milk going to Philadelphia. I assumed a classification of 91 per cent Class I-B, and 9 per cent Class III, which, from information I obtained from the Phila-

delphia Market Administrator, appears to be the approximate pro-rata of milk shipped to Sylvan Seal. I priced them at the Class I-A and Class I—Class III prices shown here, credited the handler with paying the uniform price, with differentials applicable to his area, and found that resulted in about $12,000 that the handler would have owed on that milk.

Q. Dr. Pollard, when you priced that milk, just to clear up something, that 91 per cent, you priced that at what price?

A. On the August report the price for I-B shown under [236] total class prices was $5.73813. That is about $5.74. It is the figure shown under total class price on Exhibit 19.

For the part I assumed to be Class III, I priced at $3.09604.

Q. All right, now, Dr. Pollard, what do you anticipate the Class I utilization to be, expressed percentagewise, for the market for the year 1957-'58, for a 12-month period after the effective date of the order?

Mr. DURBIN: Object.

Mr. DANIELS: Is there an objection?

Mr. DURBIN: Yes.

Mr. DANIELS: Well, if your Honor please, I am trying to show that these reports, or trying to find out whether these reports would be indicative for the year. I just want to ask him what the Administrator thinks the Class I utilization, Class I-A and Class I-B utilization, will be for a 12-month period from the effective date of the order.

Mr. DURBIN: I don't believe that any such figure as that has been published.

Mr. DANIELS: It was bandied around all through the hearing.

Mr. DURBIN: Or calculated.

Examiner BAIN: He may answer. Do you know?

The WITNESS: Let's—I'd like to say this, that the—based on the 1955 figures which were in the hearing record, it [237] was assumed that the average utilization would

be somewhere between 55 and 60 per cent; and it is my personal belief, based on the way this is going, that 60 per cent will be very close. It may be a little higher than that, or a little lower than that.

By Mr. DANIELS:

Q. All right; now, then, the only way on an annual basis that the petitioner would draw from the pool would be if his utilization of Class I-A and Class I-B would not be sufficiently higher than the market utilization to offset the differentials; isn't that right?

A. Yes, the nearby differential——

Q. Did you answer the question?

A. I was going to be a little more specific.

Q. I mean you first said yes—I didn't get the words?

A. Yes.

Q. All right,——

A. The nearby differential gives the handler with this type of a differential, of 21/10 cents, an advantage over the market of close to 10 per cent.

Q. Utilization?

A. Utilization.

That is, to compare his utilization with the market's as a whole, he should add about 10 per cent to the market as a whole to compare his own personal utilization.

[238] Q. Yes; now, when you used the term "nearby differential," and I used the term "location differential," you were using those terms interchangably?

A. I presume what you were talking about was that part of the differential that is paid out of the producers, on the basis of the location of the individual producer's milk house.

Q. That's exactly right, Doctor. Now, Doctor, if Lehigh Valley's utilization should be some place above 70 per cent in Class I-A and Class I-B, if it were a pool plant, and the market utilization would be between 55 per cent and 60 per cent, then he would owe the pool, wouldn't he? That would be your best judgment?

the Marketing Area classified as Class I-A. The figure shown as "TOTAL WHOLE MILK POUNDS" must be the same as the sum of all whole milk quantities listed as Class I-A on the upper part of Schedule "A." If the figure shown for "POUNDS-REMAINING MILK" is made up of sales and shipments in units of various sizes for example, 40 quart cans, 20 quart cans, tanks, and so forth attach to this report a tabulation showing for each size unit number of units and the total pounds of milk. In the event that any units of packaged milk leaving this plant are weighed and the specific weights of such units are recorded the pounds should be included in the figure reported as "TOTAL-REMAINING MILK." The total of the pounds shown in detail on the attached tabulation must equal the figure shown on Schedule "B" as "POUNDS-REMAINING MILK."

## SCHEDULE C

If any milk, butterfat or skim milk from other than pool sources is assigned pursuant to the Rules and Regulations to Class I-A, Class II, or skim subject to payment, the milk, milk equivalent of butterfat, or skim milk, so assigned must be reported in this schedule. The amount of payment required by the Marketing Order for such quantities of milk, butterfat, or skim milk must be computed on this schedule. The applicable provisions of the Order which prescribe the rates for pricing and the computation of the credit if applicable are set forth in Secs. 927.83 and 927.84.

## TIME OF FILING AND OF MAKING PAYMENT

If the operations of the plant covered by this report are such that milk or milk products are subject to payments under Secs. 927.83 and 927.84 this report should be filed in time to reach the office of the Market Administrator on or before the 10th of the month following the month for which this report is prepared. The obligation to the producer settlement fund computed on Schedule "C" must be paid on or before the 18th day of the month following the month for which this report is prepared. If the operations are such that there is no milk or milk product subject to payment under Secs. 927.83 or 927.84 this report should be filed on or before the 20th day of the month following the month for which this report is prepared.

Make checks payable to "Market Administrator."

Registered by _____ Date _____

MARKET ADMI
N.Y.

| | |
|---|---|
| Pint—Paper | 3,582 |
| Pint—Glass | -0- |
| Half Pint | 17,00 |
| Third Quart | -0- |
| TOTAL QUARTS | |
| POUNDS (Multiply "Total Quarts" by 2.15) | |
| POUNDS-REMAINING MILK (See instructio | |
| TOTAL WHOLE MILK POUNDS (Must eq ments" C | |

.57681

## SCHEDULE C—COMPUTATION OF

NON POOL MILK AND MILK PRODUCTS ASSIGNED

| DESCRIPTION | CLASS | POUNDS OF MILK MILK EQUIVALENT |
|---|---|---|
| From known non pool sources | I-A | 677,682 |
| | II | |
| LESS Credit | Sec. 927.83 | 677,682 |
| From sources not established | I-A | |
| | II | |

NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO P

| DESCRIPTION | | POUNDS OF SKIM |
|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 10,681 |
| From sources not established | Not subject | |
| TOTAL OBLIGATION (Payable on the 18th of the month following | | |

This report properly signed must be submitted on or before the 10th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to:

MARKET ADMINISTRATOR
205 East 42nd Street, New York 17, N. Y.

ified as Class I-A. The figure shown as "TOTAL WHOLE MILK ne as the sum of all whole milk quantities listed as Class I-A on the " If the figure shown for "POUNDS-REMAINING MILK" is made up its of various sizes for example, 40 quart cans, 20 quart cans, tanks, and t a tabulation showing for each size unit number of units and the total that any units of packaged milk leaving this plant are weighed and the its are recorded the pounds should be included in the figure reported MILK." The total of the pounds shown in detail on the attached tabula- hown on Schedule "B" as "POUNDS-REMAINING MILK."

m milk from other than pool sources is assigned pursuant to the Rules A, Class II, or skim subject to payment, the milk, milk equivalent of assigned must be reported in this schedule. The amount of payment Order for such quantities of milk, butterfat, or skim milk must be com- e applicable provisions of the Order which prescribe the rates for n of the credit if applicable are set forth in Secs. 927.83 and 927.84.

OF FILING AND OF MAKING PAYMENT

t covered by this report are such that milk or milk products are subject 7.83 and 927.84 this report should be filed in time to reach the office r on or before the 10th of the month following the month for which obligation to the producer settlement fund computed on Schedule efore the 18th day of the month following the month for which this erations are such that there is no milk or milk product subject to pay- 927.84 this report should be filed on or before the 20th day of the for which this report is prepared.

ke checks payable to "Market Administrator."

Date

| | | | |
|---|---|---|---|
| Pint—Paper | 3,582 | ÷ 2 | 1,791 |
| Pint—Glass | -0- | ÷ 2 | -0- |
| Half Pint | 17,003 | ÷ 4 | 4,251 |
| Third Quart | -0- | ÷ 3 | -0- |
| TOTAL QUARTS | | | 315,201 |
| POUNDS (Multiply "Total Quarts" by 2.15) | | | 677,682 |
| POUNDS-REMAINING MILK (See instructions) | | | |
| TOTAL WHOLE MILK POUNDS (Must equal "Total Sales and Shipments" Class I-A Schedule "A") | | | 677,682 |

Zone 76-80

## SCHEDULE C—COMPUTATION OF PAYMENT TO PRODUCER SETTLEMENT FUND

NON POOL MILK AND MILK PRODUCTS ASSIGNED TO CLASS I-A AND CLASS II

| DESCRIPTION | CLASS | POUNDS OF MILK OR MILK EQUIVALENT | CLASS PRICE | DIFFERENTIALS BUTTERFAT + or − | DIFFERENTIALS TRANSPORTATION + or − | TOTAL CLASS PRICE | VALUE |
|---|---|---|---|---|---|---|---|
| From known non pool sources | I-A | 677,682 | $ 5.83 | $ +.1559 | $ +.182 | $ 6.1679 | $ 41,798.75 |
| | II | | | | | | |
| LESS Credit | Sec. 927.83 | 677,682 | 3.172 | +.2885 | +.182 | 3.6425 | 24,684.57 |
| | | | | | Sub-total | | 17,114.18 |
| From sources not established | I-A | | | | | | 18,730.19 |
| | II | | | | | | |
| | | | | | Sub-total | | 17,114.18 |

NON POOL SKIM ASSIGNED TO SKIM SUBJECT TO PRICING

| DESCRIPTION | | POUNDS OF SKIM | RATE | | TRANSPORTATION + or − | TOTAL RATE | |
|---|---|---|---|---|---|---|---|
| From known non pool sources | Subject to Fluid Skim Differential | 10,681 | 2.148 | | +.182 | 2.330 | 248.87 |
| From sources not established | Not subject | | | | | | |
| TOTAL OBLIGATION (Payable on the 18th of the month following the month for which this report is submitted) | | | | | | | $ 18,979.06 17,363.05 |

This report properly signed must be submitted on or before the 10th of the month following the month for which the report is prepared if products from other than pool sources are assigned to Class I-A or Class II or to skim payment. Otherwise the report must be submitted on or before the 20th of such month to:

MARKET ADMINISTRATOR
205 East 42nd Street, New York 17, N. Y.

I, the undersigned, hereby certify that the information given in this report, is true and complete to the best of my knowledge, information and belief.

Handler's Name LEHIGH VALLEY COOPERATIVE FARMERS

Signed by George A. Baumer
(Person authorized to sign in behalf of handler)

Title Comptroller Date October 16, 1957

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| S. A. Zimmerman | Washington, N.J. | Heavy Cream | 1,003 | 40. | 401,200 | | | | | | |
| Bocnstra Dairy | Patterson, N.J. | Heavy Cream | 63 | 40. | 25,200 | | | | | | |
| Continental Creamery | Easton, Pa. | Past.Skim | 14,861 | .01 | 1,486 | | | | | | |
| Continental Creamery | Easton, Pa. | Medium Cream | 338 | 30. | 101,400 | | | | | | |
| United Cheese Co. | Wind Gap, Pa. | Raw Skim | 22,896 | .01 | 2,290 | | | | | | |
| Continental Creamery | Easton, Pa. | Buttermilk | 430 | 1.5 | 6,450 | | | | | | |
| See Continuation Sheet | | | | | | | | | | | |
| **TOTAL SALES AND SHIPMENTS** To Manufacture | | | 4,296,682 | 3.96458 | 170,345,793 | | | | | | |
| **ADD — CLOSING INVENTORIES** (See Attached Schedule) | | Milk | 599,853 | 3.87804 | 23,262,596 | | | | | | |
| | | Cream | 254,517 | 36.04663 | 91,744,812 | | | | | | |
| | | Other Products | | | | | | | | | |
| **TOTAL SALES, SHIPMENTS, and ON HAND** | | | | | | | | | | | |
| **ADD — PLANT LOSS** (pursuant to the Rules and Regulations) | | | 494,984 | 5.63026 | 24,869.912 | | | | | | |
| **REMAINING QUANTITIES** (the disposition of which has not been established) | | | | | | | | | | | |
| **TOTAL CLASSIFICATION** | | | 16,475,283 | | 741,047,282 | 677,682 | 26,361,072 | | | | |

## ASSIGNMENTS

| | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|
| **OPENING INVENTORIES** | | Milk | 314,734 | 3.85827 | 12,140,330 | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821.053 | | | | | | |
| | | Other Products | | | | | | | | | |
| **RECEIPTS FROM OTHERS** (List Name and Location) | | Name of Product | | | | | | | | | |
| Chippewa County Cooperative | Bloomer, Wis. | Milk | 68,910 | 4.05012 | 2,790.940 | | | | | | |
| Chippewa County Cooperative | Bloomer, Wis. | Cream | 138,360 | 40. | 55,344.000 | | | | | | |
| Abbotts Dairy | Cameron, Wis. | Cream | 34,750 | 40. | 13,900.000 | | | | | | |
| Sylvan Seal Dairy | Philadelphia, Pa. | Raw Milk | 367,667 | 3.63539 | 13,366.129 | | | | | | |
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| **FROM DAIRY FARMERS AND OWN FARMS** | | | 15,200,059 | 3.57686 | 543,684.830 | | | | | | |
| **FROM SOURCES NOT ESTABLISHED** | | | | | | | | | | | |
| **TOTAL ASSIGNMENT** (Total pounds assigned for each class column must equal the total classification shown above for the same column) | | | 16,475,283 | | 741,047.282 | | | | | | |

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | Washington, N.J. | Heavy Cream | 1,003 | 40. | 401,200 | | | | | | | | |
| | Patterson, N.J. | Heavy Cream | 63 | 40. | 25,200 | | | | | | | | |
| | Easton, Pa. | Past.Skim | 14,861 | .01 | 1,486 | | | | | | | | |
| | Easton, Pa. | Medium Cream | 338 | 30. | 101,400 | | | | | | | | |
| | Wind Gap, Pa. | Raw Skim | 22,896 | .01 | 2,290 | | | | | | | | |
| | Easton, Pa. | Buttermilk | 430 | 1.5 | 6,450 | | | | | | | | |
| | | | | | | | | | | | | | |
| Manufacture | | | 4,296,682 | 3.96458 | 170,345,793 | | | | | | | | |
| e Attached Schedule) | | Milk | 599,853 | 3.87804 | 23,262,596 | | | | | | | | |
| | | Cream | 254,517 | 36.04663 | 91,744,812 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| AND | | | | | | | | | | | | | |
| Regulations) | | | 494,984 | 5.63026 | 24,868,912 | | | | | | | | |
| which has not been established) | | | | | | | | | | | | | |
| | | | 16,475,283 | | 741,047,282 | 677,682 | 26,361,672 | | | | | | |

MARKET ADMINISTRATOR
N.Y. - N.J. MILK MARKETING AREA
RECEIVED
OCT 17 1957
AM 7,8,9,10,11,12,1,2,3,4,5,6 PM

| | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | Milk | 314,734 | 3.85827 | 12,140,330 | | | | | | | | |
| | | Cream | 350,803 | 28.45501 | 99,821,053 | | | | | | | | |
| | | Other Products | | | | | | | | | | | |
| cation) | | Name of Product | | | | | | | | | | | |
| | Bloomer, Wis. | Milk | 68,910 | 4.05012 | 2,790,940 | | | | | | | | |
| | Bloomer, Wis. | Cream | 138,360 | 40. | 55,344,000 | | | | | | | | |
| | Cameron, Wis. | Cream | 34,750 | 40. | 13,900,000 | | | | | | | | |
| | Philadelphia, Pa. | Raw Milk | 367,667 | 3.63539 | 13,366,129 | | | | | | | | |
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| | | | | | | | | | | | | | |
| MS | | | 15,200,059 | 3.57686 | 543,684,830 | | | | | | | | |
| | | | | | | | | | | | | | |
| (for each class columns must equal shown above for the same column) | | | 16,475,283 | | 741,047,282 | | | | | | | | |

A. Well, I have a little different judgment from that. If the handler were in a position of taking an option of paying compensatory payments at certain times of the year, and being fully pooled at other times of the year, I will assume that he would try to be fully pooled at such times as the payment that he would expect that his—either his obligation to the pool or his collection out of the pool or his payment into the pool would be less than his compensatory payment, or he would be collecting out of the pool.

Q. Yes.

A. If he thought that the—being fully pooled for any month was going to require him to pay more into the pool [239] than the compensatory payment would be on the milk for that month, he would elect for that month to pay compensatory payments, with the result that he has—he is a little better off than you would indicate under such circumstances, because his months when the pool would be paying him would not necessarily be offset by pool obligations in the months when he would have to pay into the pool.

Q. I am following you, go right ahead.

A. Because his utilization was higher than the—was at such a height that he would require a full pool obligation.

Q. Now, before I ask you to answer my question, I will ask you this: What you have just suggested is suggesting riding the pool, isn't it, you are suggesting that a handler ride the pool? And I don't much care whether Mr. Loomis and the rest of them shake their heads "No," or not, you give me your impression. When you look over there they are shaking their heads, but that is a suggestion to ride the pool, is it not, that's what we call riding the pool?

A. I think it may have a little of that, but not to the——

Q. Good.

A. I personally have never worried about the philosophy of riding the pool. I have assumed that once the pool provisions have been written, that handlers could use their best judgment as to when they should be in the pool and when they should be out of the pool.

[240] Q. But you are suggesting that when his utilization was more than 10 per cent higher than the market's utilization, then he run out of the pool and pay compensatory payment; and that when his utilization is within 10 per cent of the market utilization, that then he come in the pool and draw money out? That you are suggesting, aren't you?

A. No, I'm not quite suggesting that, I am suggesting that he not leave the pool until his utilization average would require him to pay more than the compensatory payments.

Q. For the month?

A. For that month.

Q. So you are suggesting that he go in and out of the pool, depending on his utilization as it is related to the market's utilization?

A. Well, you asked me whether I thought that if he were above 70 per cent, which is about 10 per cent over the market average, and that it would mean that he would have a net payment into the pool, and I just described to you how it doesn't necessarily mean that.

Q. But it would mean that if he stayed in the pool for 12 months, and came out with a Class I-A, Class I-B utilization of something above 70 per cent, and the market's utilization was between 55 and 60 per cent?

A. If he were in the pool each month, then it might result in a slight payment into the pool. I personally doubt [241] whether being in the pool 12 months of the year for this handler would result in him having to pay the pool anywhere near what compensatory payments would have cost him.

Q. Well, that would depend on what your idea of what his Class I-A and Class I-B utilization is, wouldn't it?

A. And my idea of what I think the pool will do.

Q. You have said that you think 60 per cent is probably about right for the pool?

A. I said I thought it would be nearer the 60 than the 55.

Q. And you haven't any notion as to what Lehigh Valley's utilization is going to be?

A. I haven't figured it out, but I think that I have a little more than just no notion of it.

Q. But not nearly as good an opinion as Mr. Boger would have?

A. I should think he would be in a better position to know than I am. I hope so.

Q. When you say that with a plant located in the area in which this plant is located, and with farmers located in the area in which they are located, that the difference in utilization would have to be something more than 10 per cent, that is assuming that all his milk is pooled, that is not eliminating any milk that goes to Philadelphia, or anything?

A. No, that—when I talk about it on a percentage basis, [242] it doesn't matter where—how much milk is handled, or where the milk goes. If his classification of milk actually under classification comes to somewhere in the neighborhood of 10 per cent above the market average, he will be on about a par, if my estimates of the nearby differential are about right.

Q. And that is 21.9 cents?

A. Yes. This 21.9 cents, however, I want to point out, eliminated the producers that on my record had been shipping to Philadelphia in June. And if you added them in, that would not be 21.9 cents, but something a little better than an average of 23 cents.

Q. Now, then, if the actual facts were developed and it was shown that more milk came from a further distance away, then that 21.9 cents and the 23 and some tenths cents would be reduced?

A. If the—if the volumes of milk could affect that, although it is my opinion it won't change this average very much.

Q. Well, what is that opinion based on, when you don't know where any of the milk comes from and where the big producers are located?

A. Oh, it's just my experience with statistics, and also some knowledge of what to expect from some of those areas as far as production is concerned.

Q. But no specific knowledge concerning Lehigh Valley [243] Coop?

A. We would have a more accurate figure if we had the actual volumes by zones.

Mr. DANIELS: No further questions.

Examiner BAIN: Any redirect?

I don't believe we have got that far yet, I suppose those were questions on the exhibits.

Mr. DANIELS: Yes, sir, they were.

Examiner BAIN: Any further questions?

Mr. DURBIN: Yes, I want one clarifying question.

By Mr. DURBIN:

Q. Dr. Pollard, you testified that assuming that all milk was included in this calculation, Lehigh Valley would owe $12,000; don't you mean by that that from the $23,000 which you calculated they would draw from the pool, you would deduct that $12,000, and it would leave them drawing out of the pool $11,000?

A. Yes. I think I was talking what they would owe on this particular milk shipped to Philadelphia. And that of course offset the $23,000, leaving a net balance to the handler of $11,000 in that month.

• • • • •

[247] Examiner BAIN: Now, the adjustments are the matters that are added to and subtracted from, and I believe you have testified to all those, have you not?

The WITNESS: I'm not sure that I testified specifically with respect to the adjustments shown here. The first adjustment for butterfat is an increase in an obligation, [248] inasmuch as this handler's milk on this month tested less than the 3.5 per cent butterfat. It is an adjust-

ment figure to show what he would have owed if his milk had tested 3.5 per cent, instead of 3.44033. In other words, that amount of money will be deducted from the average paid to producers, because on the average they tested less than 3½ per cent.

The next adjustment of 18 2/10 cents is—represents the payments to the producers at this plant because the plant that their milk was delivered to was in the 71-75-mile zone, and that is the figure that is required to be—those producers are entitled to get. In other words, those producers would get in the way of a transportation adjustment $23,902.71.

The location differentials I have testified to before. That comes from Schedule E.

The net adjustments of all these things taken together are shown under "total adjustments," which is $48,119.31, which means it is the net amount of adjustments that will be paid to producers at this plant.

• • • • •

[260] Mr. BOGER: You asked for the names and addresses of shippers shipping to Sylvan Seal during the month of June, 1957. There is that list.

And for the names of all shippers shipping milk to Lehigh [261] Valley Cooperative Farmers during August, 1957, the location of farms as to township, and pounds of milk shipping into the plant for the month of August. And there is that list.

Mr. DURBIN: I would like to offer the two lists furnished to me in response to the subpoena in evidence.

Mr. DANIELS: I object on the same ground that I objected in the hearing yesterday that those lists were not used by Dr. Pollard in preparation of Exhibits 19 and 20. And certainly I see no reason why the lists of the producers in June should be admitted. I will withdraw my objection to the list of producers in August.

Examiner BAIN: What is the purpose of the list for June?

Mr. DURBIN: That is the basis of the calculation which was made by Dr. Pollard, to which he has testified, and which he has put in the form of Exhibits 19 and 20.

Mr. DANIELS: They were the basis?

Mr. DURBIN: Yes.

Mr. DANIELS: Then I withdraw my objection.

Mr. DURBIN: In that he eliminated——

Mr. DANIELS: I withdraw my objection.

Examiner BAIN: The list for June is admitted as Exhibit 21, and the list for August is admitted as Exhibit 22.

(Thereupon, the documents above-referred to were marked Exhibits 21 and 22 in evidence.)

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[263] Mr. DURBIN: Now I ask that you reconsider your ruling as to the admissibility of that record, and I would in support of your reconsideration like to read from a decision of the Judicial Officer in the matter of Bodker Dairy Company, in 15-A D-893, appearing at the bottom of page 895.

Mr. DANIELS: Do I have a copy of that?

Mr. DURBIN: I suppose you have it, AD decisions.

"Milk orders are continuing in nature, and a challenged provision of an order is to be tested by all the 'legislative history' with respect thereto prior to the period when the [264] protested obligation imposed thereby is in effect. As the contested provision was not operative prior to the second hearing and the decision resulting therefrom, and in fact is not yet in effect, the record of that hearing and the notice thereof as they relate to the disputed provision are integral parts of the entire record upon which the challenged provision was issued and is to be tested, and are properly before us in this proceeding."

Mr. DANIELS: What was "this proceeding"?

Mr. DURBIN: It's a proceeding before the Judicial Officer contesting the validity of the Detroit order.

Examiner BAIN: Well, apparently the Secretary has overruled that decision of the Judicial Officer, so far as the 1956-'57 hearings to extend the New York Milk Order are concerned, because the Presiding Officer refused to admit those other records, and the Secretary has affirmed his ruling.

Mr. DURBIN: They don't have to be admitted, they were a part of the order which was extended.

Examiner BAIN: Yes, they were a part of the order——

Mr. DURBIN: You are overlooking the fact that when the Secretary amended Order 27, he extended quite a few of the provisions that were in effect in that order to the extended area. Now, if anyone challenges any one of those provisions that was based on a prior record, that record necessarily has to be introduced to show the validity of that [265] provision in Order 27.

Examiner BAIN: Absolutely, that is what I ruled yesterday.

Mr. DURBIN: And therefore this 1953 record showing that the compensatory payment provision was properly written into the order should be a part of this record.

Examiner BAIN: No, that is not the issue here.

Mr. DURBIN: I don't know how else you would interpret it.

Examiner BAIN: It is not a question of interpretation.

Mr. DURBIN: You have got to have the record supporting the provision, in addition to which you have got to have any testimony that was in the current record——

Examiner BAIN: The provisions which came out of that 1953 record are not attacked in this proceeding.

Mr. DURBIN: It is identically the same provision, word for word.

Examiner BAIN: I don't care to change my ruling. Do you have further argument?

Mr. DURBIN: Would you restate your ruling so we may know what it is?

Examiner BAIN: I sustained the objection to incorporating by reference or officially noticing the 1953 record.

Mr. DURBIN: For what purposes? I think you had some other part to your ruling, and that is what I want to get clarified here, sir.

[266] Examiner BAIN: I just sustained the objection to it because it is not an issue in this proceeding. The extension of it to the new area is an issue here, but not the provision which came out of the 1953 record.

Mr. DURBIN: May I get a clarification from you on how you can extend something unless it is in existence? I don't understand what you mean.

Examiner BAIN: I am not saying that you can extend something that is not in existence, I am saying directly the opposite to that. I am saying something was extended that was in existence, Order No. 27 as it existed before.

Now, what else is unclear about my sustaining that objection?

Mr. DURBIN: Well, do you mean, then, that the compensatory provision is legal, and that it was extended to the area?

Examiner BAIN: I don't mean that it was either legal or illegal, because that issue is not before me at this time in this proceeding.

Mr. DURBIN: Then you understand this proceeding differently from the way I do, because I understand that this is an attack directly upon Sections 927.83 and 927.84, which are the provisions which were written into the New York order as a result of the hearing in 1953, and that the Secretary on the basis of the record made in the 1956-'57 hearings extended that [267] provision to the new territory which was taken in at that time.

Examiner BAIN: Yes, sir.

Mr. DURBIN: And I can't see how you can test the validity of the provision which was extended unless you have the basic record on which the Secretary acted when he issued it.

Examiner BAIN: Let me repeat something that I have said 10 or 15 times. The validity of those provisions put in by the 1953 hearing is not attacked in this proceeding, nor in the proceeding we had yesterday. Counsel specifically stated that before my ruling. Now, they are not under attack.

The attack is that they could not be extended to the new area without more evidence than is in the record. That is the attack. The attack is not on the compensatory payments as compensatory payments.

Mr. DANIELS: If you Honor please, I didn't say that there may not be a legal attack purely on the basis—there will be no attack on the compensatory payment provision from 1953 to August of 1957; I am not going to say whether they were legal or illegal, I have no clients that had a right to contest that. I am contesting the legality of Sections 927.83 and 927.84 as they exist since August 1, 1957, on two grounds: One, there is no legal authority for them in the statute; and 2, if there is legal authority in the statute, there was not sufficient testimony in the 1956-'57 record to put them in the extended order.

[268] Now, that I think is what you said was my position yesterday; that is my position today.

Mr. DURBIN: Now, as a result of the ruling of the Examiner, which I think I now understand, I again want to make an offer of proof of the 1953 record, which carries the docket number that I have stated, into the record, so that in the event the ruling should be reversed, that record can be considered, or this hearing reopened for the purpose of——

Mr. DANIELS: Now, that's in the record also, we had that copied in.

Mr. DURBIN: That's right, sir, I am doing it over again.

Mr. DANIELS: Well, I am objecting. I am sure that my argument in support thereof is copied into the record, and I am not going to——

Examiner BAIN: Well the offer of proof is shown on the record, so if the Judicial Officer disagrees with my ruling

on that, just as any other ruling, he can remand the case. But he cannot admit those without remanding it.

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## PROMULGATION PROCEEDINGS, 1956-1957

THOMAS L. LAWRENCE

[169] Whereupon, THOMAS L. LAWRENCE, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DOLAN:

Q. Will you state your name, residence, and occupation?

A. My name is Thomas L. Lawrence. I reside in Sussex County, New Jersey. I own and operate a dairy farm there, and am also general manager of the United Milk Producers of New Jersey.

Q. Have you a statement to make on behalf of the United Milk Producers of New Jersey?

A. I do have.

Q. Would you proceed?

A. This statement is presented on behalf of the United Milk Producers of New Jersey, comprising as members more than 2,000 dairymen who reside in New Jersey and/or produce milk for New Jersey market. We are in support of the proposal for a State and Federal Milk Marketing Order to regulate the handling of milk in the Northern New Jersey Milk Marketing Area as proposed in the call of this hearing by the Governor's Milk Committee of New Jersey, Eastern Milk Producers Cooperative Association, Inc., and ourselves.

Federal Regulation is Needed in New Jersey:

[170] The increasing flow of unregulated and improperly priced milk has created conditions which undermine the orderly sale of milk in New Jersey. Dealers who for years have purchased New Jersey produced milk now find it ad-

vantageous to purchase milk shipped from outside the State in interstate commerce and thus meet competition. Price wars have developed and are still threatened—all of which creates a condition which Federal Regulation properly adopted can prevent.

Federal regulation in the 13 New Jersey counties as specified in the call of this hearing is needed and we insist that there must be no further limiting of the area nor should any area outside the boundaries of the State of New Jersey be included.

It is a basic principle that all dealers who are competing for sales in any market should have equal raw product costs. Whenever handlers do not have equal product costs, the seed for unfair and unjust competition is planted and the destruction of orderly marketing is under way. This situation is also highly unfair to the producers outside New Jersey who furnish this milk supply for they receive only a blend price for milk which is sold as fluid.

These conditions have existed for some time and almost all producers in New Jersey have agreed that regulation of some type and kind should be installed to require handlers who bring this milk into New Jersey to pay producers wherever [171] located a proper price for it.

Based on these factors, my organization suggested and petitioned for a State-Federal Order for the entire State of New Jersey nearly two years ago. Finally three public meetings were held in July, October and November, 1955, as a result of which the Secretary decided to limit consideration to the 13 counties. No part of this 13 county area should be excluded.

It is indicated in the call of this hearing that it may be contended that the Counties of Sussex, Warren and Hunterdon should not be included in any area to be covered by a Federal Milk Order. The facts will show that such a situation would be untenable.

The 13 county area is bounded on the East by the Hudson River and the Atlantic Ocean—on the West by the Dela-

ware River and on the North by the adjoining State of New York. Therefore, except for the Southern line, drawn arbitrarily across the State, its boundaries are well defined and its fluid milk supply almost entirely processed and distributed within its confines.

The need for Federal assistance in solving New Jersey's milk problem is unanimously conceded to be unfair competition and the destructive marketing practice caused by the importation of I-C and unregulated milk. There is no doubt that the problem exists in all 13 counties constituting [172] the proposed area. Unregulated milk and I-C milk from Order 27 have seeped into every section and if the evil is to be controlled, it will be necessary to have such controls in every part of the 13 county area. Surely, nothing can be more logical than to apply the remedy wherever the cause exists.

In this area are milk plants of several of the largest buyers of milk from New Jersey producers and from producers outside the State. Milk from these plants is sold in all areas of the State so that an order covering any part of New Jersey would bring these plants under regulation. They would, therefore, be required to pay the Class I milk price for all fluid sales.

These dealers have a large volume of sales in these three counties and are in competition with dealers who would be unregulated if these counties are not in the marketing area. Loss of sales to these New Jersey plants would mean lower returns to the producers and create a most unfair situation.

To leave the above three counties out of a marketing area would permit them to remain as a dumping ground for this cheap, improperly priced milk. Regardless of other valid reasons, I urge, with all sincerity, that no part of these counties be left ungoverned for such ungoverned areas will harrass, complicate and disrupt the proper functioning of the milk industry in New Jersey.

[173] Type of Order:

PROMULGATION PROCEEDINGS

THOMAS L. LAWRENCE

The type of order which has been proposed for New Jersey is vitally important to the protection of the legitimate interests of the producers who supply fluid milk for the New Jersey market. Milk in all of New Jersey has always been purchased on a handler pool basis. Producers in New Jersey as well as those in surrounding States whose milk is shipped regularly to New Jersey and is not now under Federal regulation strongly favor continuance of this type of pooling and it was this type of pooling which was included in the proposal made by my organization some two years ago. However, careful consideration of all the factors involved in our surrounding markets have caused us to give our support to the present proposal of a market pool with its handler pooling provisions.

New Jersey is in the unenviable situation of being sandwiched between two Federally regulated metropolitan areas; one with a handler type pool and the other a market pool. The producers in my organization are, therefore, insistent that the type of pool is a major factor if Federal regulation is to be enacted. It is important also to remember that a high percentage of the milk is produced within the proposed marketing area and that producers living in these counties are united in their view on this matter.

The interest and economic welfare of New Jersey producers and those who produce milk for the New Jersey market [174] is at stake. An order for this entire 13 county area of the type proposed by these three groups is the only one that can assure them a betterment of their economic welfare and leave them in control of their own destinies. We urge prompt action in establishing a separate order for Northern New Jersey.

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PROMULGATION PROCEEDINGS

LLOYD B. WESCOTT

[182] LLOYD B. WESCOTT, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DOLAN:

Q. Will you state your full name and residence?

A. My name is Lloyd B. Wescott and my residence is in Hunterdon County, Clinton, New Jersey.

Q. For whom do you appear?

A. I appear for the Governor's Milk Committee.

Q. What is your official position with that committee?

[183] A. I am chairman of that committee.

Q. Do you have a statement to make?

A. Yes, sir, I do.

Q. Will you proceed?

A. My name is Lloyd Wescott, and I appear on behalf of the Governor's Milk Committee of New Jersey of which I am Chairman.

I operate a dairy farm in Hunterdon County and have been closely associated with the milk business for many years. I am Vice President of the New Jersey Board of Agriculture, President of the Northeastern Dairy Conference, a Trustee of the New Jersey Farm Bureau, Vice President of The American Guernsey Cattle Club, a past president of the New Jersey Dairymen's Council, and I served as a member of the New York Milkshed Committee, known as the Case Committee, appointed by Secretary Benson in 1953.

The Problem:

Reduced to its simplest possible terms, the problem we must address ourselves to at this hearing is this:

We dairy producers profess to believe in the class pricing of milk and contend that all milk sold by dealers as fluid milk should return producers a fluid price. Under Order 27 this is accomplished for milk sold in the New York

market. In New Jersey until recently all milk produced and consumed in the State was successfully priced by a State agency.

[184] The fact remains, however, that half of the fluid milk sold in New Jersey and all the fluid milk sold in the secondary markets of New York State excepting Buffalo and Rochester comes from unregulated or I-C sources, and returns the producer a price substantially lower than the fluid price in either market. This so-called competitive price is usually the I-C price in Order 27 plus or minus seasonal differentials. As the I-C price in Order 27 fell due to the flood of Class III milk in the pool the spread between it and the fluid price in both Order 27 and New Jersey continued to widen until it exceeded $1.50 per hundredweight on many occasions. There are some 20 million pounds of such milk each year. There can be no question that the present situation is costing dairy farmers millions and millions of dollars a year.

We could spend the rest of this year assessing blame and evading the issues. It would be much more profitable for the dairymen concerned if we were to find a solution. The time for intransigence and wilfull stubborness [sic] is over. I know that when any organization ardently espouses a given position for 15 or 20 years it is hard to get down from that position regardless of the realities of the situation.

Obviously there are highly complex ramifications to what seems on the surface a fairly simple problem and I do not mean to discount them. I am aware that state control in New Jersey functions badly despite the very best efforts of an [185] able and honest director. I am aware that it is impossible to price at the producer level half the milk supply for a State and not price the other half which is available nearby at a much lower price. Nothing, however, relieves us, as dairy leaders, from the compelling necessity of coming out of this hearing with a solution for at least a large part of the problem.

* * * * *

[194] I place particular emphasis on these facts to counteract much loose and unfair talk about the selfish attitude of New Jersey producers. We have been accused of thinking only of our own selfish advantage and of trying to build a fence around the State to keep New York and Pennsylvania milk out. I have never known how we were supposed to build this fence or what we were supposed to build it of. Certainly no wall exists.

We are being accused now of wanting to unload our surplus on New York producers and to get a higher return at their expense. That is simply not the truth. We do not want a higher price than New York producers. We seek Federal regulation. We accept a market pool because Order 27 has a market pool and we have to live beside it. Our proposal provides that we carry the surplus associated with our fluid needs.

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[199] ALLEN G. WALLER, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Examiner HYDE: Mr. Dolan, shall I mark this statement for identification?

Mr. DOLAN: Please mark it for identification.

Examiner HYDE: The document bearing the caption, "Statement Prepared by Allen G. Waller for Presentation at Hearing Beginning June 18, 1956, on Proposed Federal-State Order for North Jersey," is marked Exhibit No. 27 for identification.

(Exhibit No. 27 was marked for identification.)

Examiner HYDE: Do all persons present have copies?

They have copies. That being true, the witness need not read the two or three tables that appear therein, but the [200] Reporter will copy them exactly as though read when he comes to them.

Mr. Dolan, is that agreeable to you?

Mr. DOLAN: That is agreeable.

Mr. DANIELS: Mr. Hearing Officer, will you ask the witness to hestitate when he comes to the tables so that we may look at them to better follow his statement?

Examiner HYDE: We will let him make a brief hesitation but not very long. You have the statement to take with you.

Go ahead.

DIRECT EXAMINATION.

By Mr. DOLAN:

Q. Will you state your residence and name?

A. Allen G. Waller. I live in New Brunswick, New Jersey.

Q. What is your official position?

A. Chairman of the Department of Agricultural Economics, State Agricultural College.

Q. Do you have a statement prepared for this hearing?

A. I do.

Q. Will you proceed?

A. This statement is being presented on behalf of the New Jersey Governor's Milk Committee, of which I am a member. Their proposals for Northern New Jersey, made jointly with [201] United Milk Producers of New Jersey and Eastern Milk Producers Cooperative Association, Inc., appear on pages 2-7 of the printed USDA notice of hearing.

An invitation to present factual material pertinent to this hearing also was received from H. L. Forest, Director, Dairy Division, Agricultural Marketing Service, USDA, under letter of June 1, 1956. The evidence I am presenting today also is on response to this invitation.

Currently, I am employed at Rutgers University as Chairman of the Department of Agricultural Economics. I have held this position since 1926. Also, I was a member of the department for several years prior to 1926. During this long period of work on agricultural economic

problems, I have observed and participated in many studies of many phases of milk conditions, and have attended and participated in a large number of conferences, public meetings, and hearings dealing with milk problems. In recent years, I have served as a member of the Philadelphia Class I Milk Price Committee, December 1947-June 1949; as a member of the Committee for Study of Milk Cooperatives in Relation to the New York Order, 1952-1953; as a member of Governor Meyner's Milk Committee, 1954 to date; and as chairman of a Technical Committee of agricultural economists which made a report to Governor Meyner's Milk Committee on February 23, 1955.

The specific material that I am covering in this [202] statement concerns the need for a Federal-State Milk Marketing Order for North Jersey. My presentation will be divided into three parts; first, the situation and trends; secondly, the objectives or policy that seems desirable in pricing milk in this market; and thirdly, the recommendations as to a program in line with the desired objective or policy.

1. Situation and Trends:

A comprehensive picture of the situation and trends is provided by the statistics in the report entitled, "Statistics Pertaining to Milk Prices and Marketing in New Jersey for the Governor's Milk Committee," prepared by Stewart Johnson and myself, and published in March 1955. Two revisions should be noted in these statistics. One is that the table 45 applies to the number of producers delivering milk to Order 27 plants in Somerset as well as Sussex, Warren, and Hunterdon Counties. The second is that the totals of producers and quantities of milk paid for on the basis of norm and excess plans, appearing in tables 46-47, have been corrected to 219 Grade A and 1125 Grade B producers, and that the Grade A quantity is 3,735,115 pounds and the Grade B quantity is 22,357,177 pounds. This publication, with these corrections noted therein, is now being presented as an exhibit.

Examiner HYDE: A document bearing the caption, "Statistics pertaining to milk prices and marketing in New Jersey for the Governor's Milk Committee prepared by Allen G. [203] Waller and Stewart Johnson," and the date at the bottom of the page, March 1955, is marked Exhibit 28, for identification.

Mr. WINTON: Mr. Presiding Officer, may I inquire whether copies of the statistics are to be distributed?

The WITNESS: I do not have copies here, Mr. Winton. At the time they were issued about a year ago, in March, 1955, there were a large number sent out on request to a great many people who were interested in it. I don't know whether you were one it was sent to or not.

Mr. WINTON: Were they the statistics presented at the meeting which preceded this hearing?

The WITNESS: They were entered by someone, not by myself, at one of the meetings in New Jersey.

Is that what you mean?

Mr. WINTON: Would it be very difficult to get those duplicated? It seems to me that the implicit understanding we have was that any essential part of the statements which are read should be distributed.

Mr. DOLAN: These are exhibits and not statements.

Examiner HYDE: I will agree with you on that. I am not going to require him under that arrangement.

Mr. DOLAN: I think he has some copies available which he can produce and will be glad to. I think if you would ask him privately he would be glad to.

Mr. DANIELS: Mr. Presiding Officer, how do you [204] understand the statement unless you have the exhibit?

Examiner HYDE: I will loan you a copy of mine. I have six of them.

Mr. DANIELS: I would like to have it now, then.

Examiner HYDE: Come and get it. I will charge it to you, Colonel Daniels.

Mr. WINTON: Could I borrow one, too?

Examiner HYDE: I will loan you one. I do not want to lend them all out.

Proceed.

The WITNESS: A. Size of Market.

The 13 counties of New Jersey specified in the call for this hearing had a population of 3,769,533 according to the 1950 Census. The figures by counties are as follows:

| County | Population |
|---|---|
| Bergen | 539,139 |
| Essex | 905,949 |
| Hudson | 647,437 |
| Hunterdon | 42,736 |
| Middlesex | 264,872 |
| Monmouth | 225,327 |
| Morris | 164,371 |
| Ocean | 56,622 |
| Passaic | 337,093 |
| Somerset | 99,052 |
| Sussex | 34,423 |
| Union | 398,138 |
| Warren | 54,374 |
| Total | 3,769,533 |

It is worthy of note that Northern New Jersey as defined by the Office of Milk Industry of the State of [205] New Jersey is made up of the 13 counties listed above less Ocean County. The difference in population between the 12-county and 13-county area is very small, since Ocean County has a population of but 56,622, only 1½ percent of the total given.

Since 1950 the population of this North Jersey area has increased. There are probably 4 million or so people living in this area now. This population is sufficiently large to warrant Federal milk price regulation if the need for regulation under the Marketing Agreements Act is shown.

The volume of milk sold in the Northern New Jersey area, by months, in 1952 and 1953, is given in Table 28 of the report entitled "Statistics Pertaining to Milk Prices and Marketing in New Jersey for the Governor's Milk Committee" that has been entered as Exhibit 28. Sales varied from 91,814,000 pounds in February 1952 to 103,114,000 pounds in October 1952. Later monthly data are given in the OMI "Compilation of Milk Statistics" for 1954. Total annual sales of milk were 1,185,489,000 pounds in 1952, 1,204,193,000 pounds in 1953, and 1,227,967,000 pounds in 1954.

B. Sources of Supply of Milk:

Table 8 of Exhibit 28 gives data on the sources of milk for Northern New Jersey in 1940, 1952, and 1953. The data therein given are as follows:

[206]

| Source | 1940 | Percent 1952 | 1953 |
|---|---|---|---|
| New Jersey producers not under Order 27 | 61.5 | 48.8 | 46.2 |
| Order 27 I-C | 27.2 | 21.0 | 22.6 |
| Unregulated out-of-state milk | 11.3 | 30.2 | 31.2 |
| Total | 100.0 | 100.0 | 100.0 |

The most important fact evident from these statistics insofar as a need for a Federal milk order for North Jersey is concerned is the large volume of unregulated out-of-state milk. It amounted to 31.2 percent of the total in 1953, nearly one-third of all the milk consumed in the area. Moreover, it has steadily been increasing, from 30.2 percent a year earlier, and from only 11.3 percent 13 years earlier, in 1940.

Also of significance insofar as a need for a Federal order for North Jersey is concerned is the large volume of Order 27 I-C milk. It is true that this is regulated milk. However, it is cut-price milk, returning for fluid use much less than its value at full Class I prices. This method of pricing has been abandoned under Order 27 for all New York pool milk except that going into Northern New Jersey and to secondary markets in New York State. If abandoned for all areas, as seems logical based on the Secretary's decision to abandon I-C pricing in the other areas a short time age, and if no Federal order were had in North Jersey, the Order 27 I-C milk no doubt would be replaced in large part by un-
[207] regulated out-of-state milk, and over half of the sales of fluid milk in North Jersey would be classified as unregulated.

Examiner HYDE: Because of the commitments that have been made that require some who are present to be in other places between the hour of 12 and 1:30, I will interrupt the witness at this point and recess for lunch.

We will resume in this building in one hour and 30 minutes.

(Whereupon, at 11:56 a.m., the hearing was recessed, to reconvene at 1:30 p.m., the same day.)

[208] AFTERNOON SESSION

1:30 p.m.

Examiner HYDE: The hearing is in order.

Mr. Waller, please come forward and resume the stand.

Whereupon, ALLEN G. WALLER, resumed the stand as a witness, and, having been previously duly sworn, was examined and testified further as follows:

Examiner HYDE: Dr. Waller, you may continue with your testimony.

DIRECT EXAMINATION (Resumed)

The WITNESS: C. Price Situation:

The Office of Milk Industry of the State of New Jersey sets minimum class prices for milk dealers in the State. These have been effective, however, only for milk supplied the market by New Jersey farmers. Dealers have been able to buy milk from unregulated plants located outside the State and I-C milk from Order 27 plants at whatever prices were bargained for, usually at considerably less than what was required to be paid for local milk.

Approximations of the price advantage of unregulated milk can be made from a comparison of New Jersey Class I prices for Grade B milk and uniform prices in the 201-210 mile zone under Order 27, both for milk testing 3.7 percent butterfat:

[209]

| Year | New Jersey Class I | Order 27 | Difference |
|---|---|---|---|
| 1949 | $5.54 | $4.24 | $1.30 |
| 1950 | 5.34 | 4.11 | 1.23 |
| 1951 | 5.99 | 4.70 | 1.29 |
| 1952 | 6.04 | 4.76 | 1.28 |
| 1953 | 5.84 | 4.34 | 1.50 |
| 1954 | 5.78 | 4.11 | 1.67 |
| 1955 | 5.70 | 4.09 | 1.61 |

The difference ranges from $1.23 in 1950 to $1.67 in 1954, and was $1.61 in 1955. Dealers would have a cost of operating a country plant and moving the milk from the 201-210 mile zone to North Jersey, and, if an Order 27 plant, the cost of the 20-cent charge over the blend for I-C milk, or if not, the cost of carrying some surplus manufacturing milk. If the costs are 58 cents, as provided in the suggested zone differentials for the North Jersey Order, a total of 78 cents would have to be subtracted from the differences previously given to approximate how much more cheaply outside milk could be purchased. These adjusted differences are as follows:

| Year | Difference |
|---|---|
| 1949 | $ .72 |
| 1950 | .65 |
| 1951 | .71 |
| 1952 | .70 |
| 1953 | .92 |
| 1954 | 1.09 |
| 1955 | 1.03 |

[210] Differences of these amounts, in the neighborhood of two cents per quart, are substantial inducements to dealers to buy out-of-state milk. They are a primary reason for the instability which has plagued milk producers and the dairy industry of New Jersey in recent years.

Before leaving these particular statistics, it would be well to point out that the exact price differences given above would not be expected to be applicable to each dealer each month. The exact price advantage in buying outside milk depends on how good a bargain is made. This is related to whether outside milk is brought in regularly or occasionally, and, if occasionally, at what particular time. The above differences are approximations of the average price advantage to a North Jersey dealer of buying out-of-state milk rather than milk of local producers.

This situation as to price leads to instability in the North Jersey milk market. Among the evidences thereof are the following:

(1) Inequality among dealers in product cost—some dealers obtain their milk from surplus supplies dumped in New

Jersey from other markets, while others pay the full Class I price provided by the State Milk Control Order. Dealers compete not only on how efficiently they can process and distribute milk, but also on how much cut-rate milk from outside sources that they can obtain.

[211] (2) Producers not being paid full Class I prices for Class I use—only New York Order 27 prices, or these prices with small premiums added, are paid for out-of-state milk going into fluid use in North Jersey, and producers lose substantial sums of money thereby. At those out-of-state plants which are under Order 27, producers receive for such milk only 20 cents per hundredweight over the New York pool uniform price. The unregulated plants supplying North Jersey have nearly 100 percent use in Class I the year around, yet pay producers a price based on about 50 percent Class I utilization. In table 19 of Exhibit 28, it is shown that the unregulated New York State plants supplying North Jersey had 98.2 percent of their receipts in Class I in November 1953, and 94.3 percent in Class I in the spring month of flush production, May 1954. Yet these plants were paying prices competitive with Order 27 prices, where prices are based on only 47 percent Class I use the year around in the past year or two (and this 47 percent including the 1-C milk too.)

(3) North Jersey producers losing local markets which pay State order class prices for milk, and shifting to Order 27 plants to find a home for their milk. —this occurs both in shifts of producers individually and of plants to which they sell their milk. Since the end of World War II, the number of North Jersey producers delivering to Order 27 plants has increased, while the number not delivering to Order 27 [212] plants has declined. Between 1946 and 1953, the number of North Jersey producers not delivering milk to Order 27 plants fell from 2,721 to 2,011. Meanwhile, the number of North Jersey producers delivering to Order 27 plants increased from 674 to 1,010. The increase continued in 1954 and early 1955, the number reaching 1,332

in March 1955. Although the Order 27 plants have paid competitive premiums to producers, this has been due in large part to inadequate transportation differentials under Order 27, which underprice nearby milk. The shift from local markets to Order 27 outlets has meant a loss in income to North Jersey producers despite the payment of those premiums.

(4) Unnecessary and uneconomic movement of milk—many of the Order 27 plants ship a large percentage of their receipts to out-of-state fluid outlets, and, meanwhile, the same or other dealers bring in milk for fluid use from outside the State, thus avoiding paying Class I prices for Class I use. This situation leads to more handling and transporting of milk than is consistent with efficient operations if the incentive to avoid price regulation did not exist. Although New Jersey has imported large quantities of milk in the past several years, exports have risen substantially, from 125 million pounds in 1944 to 290 million pounds, more than double, in 1954. The increase in imports is shown by New Jersey handlers' importation from outside the State of 332 million pounds in [213] the first four mouths of 1955 as compared with 228 million pounds in the same four months of 1945.

(5) Office of Milk Industry of the State of New Jersey having recurring crises in their operations—in a deteriorating situation, the OMI has found it necessary to resort to one temporary expedient after another. Its efforts to bring stability by resale price fixing, abandoning it, reinstating it, and again abandoning it are a part of this record. Difficulties wih producer price enforcement have led to Class I price changes not dictated by the standards in the State Milk Control Law upon short notice in some instances, with resulting detriment to producers.

D. Results of Previous Studies and Meetings Called by USDA on North Jersey Milk Marketing Problems:

PROMULGATION PROCEEDINGS

ALLEN G. WALLER

1. New York Milkshed Committee Report, January 1954:

This committee was appointed jointly by the U. S. Department of Agriculture and the New York State Department of Agriculture in May 1953. Its chairman was Dr. Everett Case, President of Colgate University. Its ten members included two from New Jersey, Herbert W. Voorhees, President of the New Jersey Farm Bureau and Lloyd B. Wescott, President of the New Jersey Dairymen's Council. After several months' study, the Committee unanimously recommended a Federal-State milk marketing order for North Jersey.

[214] On page 28 of its report, the Committee had the following to say:

> "Certainly the Committee is of the opinion that the present situation in New Jersey is both intolerable and indefensible. Minimum retail prices are fixed for all milk and minimum producer prices are not fixed for a large part of the supply. Even without retail price fixing, a controlled price for large blocks of milk and an uncontrolled price for other milk is indefensible from the standpoint of equity among producers and distributors, and creates instability in the market. Finally, as pointed out above, that part on which producer pricing is not enforceable is tending to increase.
>
> "As to a solution, the Committee is of the opinion that obtaining adequate regulation in more important than its particular form. Raising the Class I-C to the I-A price under Order 27 is not in itself the answer to adequate regulation for Northern New Jersey, since it does not touch unregulated milk. State regulation alone is ineffective with respect to producer prices for out-of-state milk. Auditing, legal, and administrative problems under an interstate pact, as opposed to joint Federal-State procedure, appear to the committee to out-balance any advantages such procedure might have

over [215] joint Federal-State orders. The Committee concludes, therefore, that adequate regulation can best be provided at this time through a joint federal-state order for Northern New Jersey, thus assuring full opportunity for producers supplying that market to work out their own solutions."

Those reasons, as given by the committee, appear to be fully sufficient to justify the establishment of a Federal-State milk marketing order in North Jersey.

2. Report to Governor's Milk Committee, February 23, 1955:

A technical Committee of college economists gave recommendations for a Federal-State milk marketing order in New Jersey in a report dated February 23, 1955. This report was also printed and copies distributed by the Extension Service to most of the farmers in New Jersey.

In the first paragraph of its report, the Committee had this to say about the need for a Federal order:

"The marketing of milk in Northern New Jersey should be regulated by a federal order since the State of New Jersey cannot regulate dealers' buying prices for milk purchased outside the state nor dealer buying prices for milk purchased from Order 27 plants in New Jersey. The result is a wide disparity between dealer costs for fluid milk depending on the source of supply. During recent years New [216] Jersey dairy farmers have been losing the market to out-of-state producers of unregulated and Order 27 milk. The two alternatives to a continued deterioration of the New Jersey market are (1) no regulation at all and (2) regulation which makes use of the powers of the Federal Government, a Federal order or a joint State-Federal order."

3. Press Releases Following Meetings Called by USDA:

Three public meetings, called by the USDA, have been held in the past several months (in session for a total of 17 days in 1955) to consider whether Federal regulation,

what kind, and what area should prevail insofar as milk marketing in New Jersey is concerned. In Secretary Benson's statement of February 23, 1956, the following was said which is pertinent to the need for a Federal order in North Jersey:

"I have decided that adequate regulation of the whole area can be gained more certainly and more expeditiously by holding a hearing for consideration of a separate order for the New Jersey area. The Case Committee made a similar recommendation in its report. The major problem, that is, absence of regulation in New Jersey, can be attacked directly and the special conditions which characterize the marketing of milk in the New Jersey portion of the area can be given separate attention."

[217] II. Objectives:

One important objective is that producers be paid Full Class I prices for all Class I utilization. Another objective is equality among handlers in the cost of milk for fluid use. A third objective is stability in the market. A fourth objective is the assurance to consumers of an adequate supply at all time of high-quality milk.

III. Recommendations:

The description of the situation and trends in the North Jersey market has documented the fact that, because of the large amount of interstate commerce, state milk control has been ineffective in providing a program that permits the attaining of the objectives given on page 9.

It is recommended, therefore, that a Federal-State order be adopted for the North Jersey market.

• • • • •

[218] C. W. PIERCE, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Examiner HYDE: Would you like this statement marked?

Mr. DOLAN: Yes. May the statement of Dr. Pierce be marked for identification?

[219] Examiner HYDE: The document bearing the caption, "Statement prepared for presentation at Newark Public Hearing starting June 18, 1956, Interpretation of Principles Set Forth in the Secretary's findings of December 15, 1955," is marked Exhibit No. 28, for identification.

(Exhibit No. 28 was marked for identification.)

Examiner HYDE: Proceed.

Mr. DOLAN: May I inquire if everyone in the room has a copy of the statement who desires one?

Examiner HYDE: Apparently everyone has a copy of the statement, Mr. Dolan.

If they do not, a copy for anyone in the room who wants it is available.

DIRECT EXAMINATION.

By Mr. DOLAN:

Q. Doctor, do you have a statement prepared for the record?

A. I do.

Q. Will you proceed?

A. Yes. My name is C. W. Pierce. I reside at 425 East Whitehall Road, State College, Pennsylvania. I am presenting this statement on behalf of the Governor's Milk Committee of New Jersey, who, along with United Milk Producers of New Jersey and Eastern Milk Producers Cooperative Association, Inc., [220] are presenting proposals which appear in the hearing notice, pages 2 to 7.

My qualifications as a witness include the following: For the past 18 years, I have been a member of the teaching and research staff of the Department of Agricultural Economics at The Pennsylvania State University. I was a

member of the New York and Philadelphia Class I Price Committees and of the Committee for the Study of the Role of Cooperatives under Order 27.

During the past several years, I have had the opportunity to study carefully many aspects of the marketing of milk in North Jersey. As a consultant employed by the Market Administrator of Order 27, I prepared and presented considerable statistical material at a hearing held in Newark, New Jersey, starting in June 1952. For several months following that hearing I continued to study the marketing of milk in Northern New Jersey and immediate surrounding area. Later, I was a member of the Waller Committee which prepared a report for the Governor's Milk Committee under date of February 23, 1955. During 1955, I have been associated with the Governor's Milk Committee as a consultant, assisting in the preparation of proposals for an order to regulate the marketing of milk in North Jersey.

Following public meetings held in Trenton and Newark, New Jersey, the United States Secretary of Agriculture issued [221] a statement dated December 15, 1955, setting forth certain principles to be used as criteria for testing the adequacy of proposals for a separate order for North Jersey. Since these principles were stated in general rather than in specific terms, it has been necessary to interpret them in making proposals for a North Jersey Order. Since, prior to the operation of an order, its provisions cannot be exactly tested in terms of the Secretary's principles, it is our desire to set forth our interpretation of these principles and to show how consideration is given to them by the proposed provisions for a North Jersey order as listed in the Hearing Notice, pages 2-7.

Surplus Associated With Fluid Sales:

Our principle concerns the responsibility of a market for surplus milk. It was stated that, "A separate order for New Jersey must be devised so as to insure that pro-

ducers under . . . (the) order carry the surplus associated with their fluid outlets." Three categories of surplus are associated normally with a fluid milk market, (1) necessary surplus, (2) seasonal surplus, and (3) periodic surplus.

Necessary Surplus:

A necessary surplus is a volume of milk in addition to normal fluid milk sales necessarily available to guard against the usual and the unexpected daily and weekly fluctuations in both production and fluid milk sales. Such a [222] surplus needs to be available at all times of the year, but is usually thought of and measured in terms of sales during the month of lowest milk production seasonally.

The concept of a necessary surplus has been discussed frequently in the literature concerned with milk marketing. Gaumnitz and Reed in a publication entitled "Some Problems Involved in Establishing Milk Prices," issued in September 1937 by the United States Department of Agriculture stated, "It appears that a volume of about 10 percent in excess of the average daily sales of distributors is probably necessary in order to meet daily variations in the demand for milk." Additional milk would be necessary to take care of the unexpected fluctuations in production. On pages 31 and 32 of the Report of the Federal Milk Order Study Committee, as reproduced by the United States Department of Agriculture in October 1954, reference is made to necessary surplus. In order to adequately serve a fluid market there is a requirement for a 'necessary surplus.' In some markets the trade considers that a surplus of about 20 percent of the market requirements is necessary in order to adequately service the market."

Regulations affecting the movement and merchandising of milk marketing, Research Report No. 98, was published by United States Department of Agriculture in June 1955. This report mentioned necessary surplus on page 44. "Because of [223] day-to-day fluctuations in the production of

milk and of Class I sales, over a period of a month, there must be a substantial excess of supply over actual Class I sales. It is generally considered that this operating reserve needs to be 15 to 20 percent in excess of the Class I sales."

If it is necessary to have receipts 20 percent in excess of the normal usage of milk for fluid purposes, it would be possible to have 83.3 percent of the total receipts used as fluid milk during the month of lowest milk production, and yet have a volume of surplus adequate to service the market.

As a part of a statement made before the House of Representatives, commodity subcommittee on dairy products of the Committee of Agriculture, Wednesday, April 20, 1955, Mr. H. L. Forest, Director of the Dairy Division, submitted a table which shows the utilization percentages in Federal Order milk marketing areas by months during 1954. These percentages represent that portion of the milk received from producers which was needed for fluid uses required to be supplied from approved sources. Data were contained in the table for 49 markets for each month during 1954. The milk used in fluid form was in excess of 100 percent of the milk received from producers in at least one month in fourteen of the 49 markets. In 18 of the markets, the percentage was less than 100 but exceeded 83. In 12 of the markets, the percentage [224] was less than 83 but exceeded 73, and in the other five markets the percentage was less than 73. Thus in 32 of the 49 markets having Federal Orders during each of the 12 months of 1954, fluid milk sales were in excess of 83 percent of receipts from producers during at least one month of the year. That the milk available in these Federal order markets constitutes an adequate supply as attested by the Federal Milk Order Study Committee in the report previously mentioned. A summary statement on page 3 of the report reads, "The primary purpose of Federal milk marketing orders is to maintain an adequate supply of milk, and to achieve orderly marketing. This is being accomplished in fluid milk markets with Federal Orders."

Seasonal surplus:

A second category of surplus is that which results from the seasonal variation in milk production relative to rather constant fluid milk sales. Milk production in New Jersey in 1955 reached a high in May and a low in August. Receipts of milk at 35 plants outside New Jersey, each shipping 10 percent or more of their receipts to the New Jersey market during August through November according to data compiled by the New Jersey Office of Milk Industry, reach a high in May and a low in August. May production in New Jersey exceeded August production by 31 percent. May receipts at the 35 plants outside New Jersey exceeded August receipts by 59 percent. The unweighted average of these two [225] percentages is 45.

If, during August, Class I sales constituted 83.3 percent of receipts of milk from producers, an increase in producer receipts of 45 percent without any changes in Class I sales would reduce the percentage utilization in Class I to approximately 57.

Periodic surplus:

A third category of surplus can be termed "periodic" surplus, that which develops from time to time when annual milk production expands more rapidly than annual sales of fluid milk. In 1948, the fluid milk markets in the Northeast were characterized by supplies closely in line with market needs. Since 1948 milk production has increased more rapidly in the region as a whole than has population. Many Northeastern markets are now plagued by burdensome surpluses.

The population of New Jersey has increased from 4,657,000 people on July 1, 1948 to 5,420,000 people on July 1, 1955, an increase of 16.38 percent. Milk production in New Jersey has increased from 1,056 million pounds in 1948 to 1,178 million pounds in 1955, an increase of 11.55 per cent. Population has increased faster in New Jersey than has milk production. In North Jersey markets, fluid milk

sales are likely to have increased more rapidly than milk production in North Jersey. Considering these facts only, the North Jersey market should not be considered to have any periodic surplus [226] associated with it.

North Jersey, however, does not produce a supply of milk adequate for the fluid needs of North Jersey markets. About one-half of the supply comes from New York and Pennsylvania. Therefore, the North Jersey market must be assumed to be responsible or have associated with it some of the increased milk production in Pennsylvania and New York.

Milk production in New York State in 1955 exceeded 1948 production by 23.45 percent. Pennsylvania production in 1955 was 21.29 percent in excess of 1948 production. In the two States production increased 22.59 percent between 1948 and 1955.

An unweighted average of the production increases in Pennsylvania and New York combined in one unit and in New Jersey between 1948 and 1955 is 17.07 percent. This compares with a population increase in New Jersey of 16.38 percent. On this basis, if a necessary surplus of 20 percent in 1948 allowed a Class I utilization of 83.3 percent in the month of low milk production, the slightly more rapid increase in production than in sales (as measured by population) would reduce the utilization percentage to 82.8 in 1955.

The accumulation of surplus milk in a market or in an area is in part the result of the relationship between the blend price for milk and costs for producing milk and financial opportunities for farmers to use their productive [227] resources in alternative opportunities. The blend price in a market, until surplus develops, is regulated primarily by the Class I price. The Order 27 Class I-A price has been one of the highest Class I prices in the Middle Atlantic States. Although the proposed order for North Jersey accepts the Order 27 Class I price, an order which will promote an adjustment of production to sales and

therefore a high Class I utilization rather than a high Class I price is considered a desirable objective.

The Secretary's statement has not been interpreted by our group to mean that a North Jersey Order should necessarily carry the same proportion of surplus milk as does Order 27. There are several reasons:

(1) The Health Departments concerned with North Jersey markets do not require that cream for table cream and for ice cream come from farms and plants approved for shipment of fluid milk. In the fall months of the year approximately 9 percent of receipts at Order 27 pool plants is used for Class II. Some surplus is necessary to service this fluid cream market. Therefore, it will be possible to have a closer adjustment between receipts of milk and Class I sales in the North Jersey market than in the Order 27 market.

(2) The seasonal production of milk is rather extreme among Order 27 producers, particularly in the outer reaches of the milkshed.

[228] The proposed North Jersey order contains provisions for a base-surplus plan which will encourage uniform production, discourage the expansion of milk production when not needed to service the market, and reward producers in relationship to the opportunity for their milk to be used for fluid use. Naturally the uniformly produced milk will be attracted to the North Jersey market unless Order 27 is amended to place a relatively greater value on milk available on a year around basis for fluid needs. If Order 27 is amended in this manner, not only will the New Jersey order have a greater opportunity for keeping production in line with sales, but the producers supplying milk to Order 27 plants will be paid more in line with the market values of their milk.

(3) Order 27 carries more than either a necessary or a desirable amount of surplus and some surplus which should be associated with other than its own or the New Jersey market. The claim is made that Order 27 carries

surplus for many secondary markets in New York, Pennsylvania, and New England. Order 27 appears to have absorbed supplies of manufacturing milk by virtue of various provisions of the Order. Production in the distant zones has been encouraged by inadequate transportation differentials. Equity would not be attained by dividing such surplus proportionately between Order 27 and North Jersey. The Secretary's statement "Carry the surplus associated with its fluid outlets" certainly does not imply any such [229] proportionate division of surpluses.

Uneconomic and Disorderly Shifting:

A second principle set forth in the Secretary's December 15 statement is to "provide for such minimum uniform prices to producers that there will be no incentive for uneconomic and disorderly shifting of producers or plants from one market outlet to another." Any understanding of this principle depends on the interpretation of the words "uneconomic and disorderly."

Considerable shifting of plants and some shifting of producers should be expected during the first year or two of the operation of a separate order for North Jersey. Certainly the status quo cannot be considered as being an economic and orderly alignment of supplies with markets.

Within the past few years a number of plants located in New Jersey and processing milk solely for North Jersey markets have become Order 27 pool plants. A shifting to a North Jersey Order by these plants would provide a more orderly arrangement than the present alignment. A number of Order 27 plants outside New Jersey regularly ship milk to the New Jersey market. A transfer of those plants to the North Jersey pool would be orderly.

A number of Order 27 plants have health approval for North Jersey markets but ship fluid milk irregularly and on a monthly basis in small quantities. Some of these [230] plants would become aligned with the North Jersey market as regular suppliers, others would not. Such an

alignment would be more orderly than the present arrangement.

Undoubtedly, some unregulated plants outside New Jersey have in the past shipped milk to North Jersey because of being able to take advantage of chaotic marketing conditions. With Class I prices established regardless of the source of the milk New Jersey handlers can be expected to lose interest in such milk with the result that such plants will not become pool plants under the Order. Such shifting of sources of milk supply should be expected and will be economic and orderly.

The proposals for a North Jersey Order included a base surplus plan and location differentials. Both are intended to recognize important values of milk. In response to these, certain plants and some producers may choose to become a part of the North Jersey supply, even though their milk is now sold in the New York City market. Shifts in response to such provisions can be considered uneconomic only if the provisions themselves are uneconomic. That shifting should occur, however, will not automatically stamp the provisions as uneconomic. The uneconomic provisions may well be those in Order 27 which undervalue such milk.

Our conception of disorderly shifting of plants and producers is that which would take place if producers or plants shifted back and forth from one pool to another. The[231] base surplus provision, the location differential provision, and the shipping requirements for pool plants will tend to discourage and largely eliminate such disorderly shifting.

Our conception of uneconomic shifting of plants and producers is that which would occur if the New Jersey market should attract more milk than is needed to service its fluid requirements or if milk should be attracted from long distances with nearby milk being diverted to other uses. The location differentials and the base surplus plan will tend to discourage such uneconomic shifting.

Price differences based on real values of milk will not cause uneconomic shifting of either producers or plants. Such differences, once the reasons for them are understood, may not even cause dissatisfaction.

• • • • • •

[247] Q. Will you state your full name and occupation, Mr. York?

A. My name is John C. York. I am Economist for Eastern Milk Producers Cooperative Association, Inc.

Q. And will you make your statement at this time, please?

A. The statement of qualifications?

Q. Including qualifications.

A. Briefly, my qualifications are as follows: I was born and raised on a dairy farm where I acquired practical experience in milk production. My experience in pricing regulations started nearly 20 years ago when I appeared as a witness on behalf of producers before the Pennsylvania Milk Control Commission.

• • • • • •

[261] Whereupon, C. W. PIERCE, was recalled to the stand, and, having been previously duly sworn, was examined and testified further as follows.

DIRECT EXAMINATION—Resumed.

By Mr. DOLAN:

Q. Do you have a further statement, Dr. Pierce, to make on compensatory payments, Section 990.98?

A. Right.

Mr. DOLAN: I ask that the statement be marked as an exhibit for identification.

Examiner HYDE: The document bearing the caption "Statement prepared for presentation at Newark Public

Hearing, starting June 18, 1956, by C. W. Pierce" with the subnote Compensatory Payments, Section 990.98, is marked Exhibit Number 33, for identification.

(Exhibit Number 33, marked for identification.)

By Mr. DOLAN:

Q. Doctor, would you proceed to give the statement?

A. References:

In this statement, several references will be made to two publications. One will be referred to as the "Study of Regulations." This is "Regulations Affecting the Movement and Merchandising of Milk, Marketing Research Report" [262] No. 98 Agricultural Marketing Service, United States Department of Agriculture, June 1955.

The other will be referred to as the "Federal Order Study Committee." This is the "Report of the Federal Order Study Committee" reproduced through the facilities of the United States Department of Agriculture, October 1954.

Problem:

The function of a Federal order is to regulate the handling of milk sold within a particular marketing area. This function is performed by establishing prices which handlers must pay for milk and by providing a method for distributing among producers, the proceeds from the sale of milk to handlers.

Essential to any order regulation is the determination of what milk is to be regulated and consequently, which milk producers are to share in the proceeds from the sale of the milk. To accomplish these purposes an order defines a marketing area and pool plants. Unfortunately most boundaries of marketing areas are such that some milk in packaged form crosses on wholesale and retail routes. In most cases, some milk is moved into the marketing area from plants

not regular suppliers of milk for the marketing area, and, therefore, not qualified as pool plants.

Because of the characteristics of market milk, a surplus of milk from regular sources is necessary if the [263] market is to be adequately supplied at all times. To cope with this surplus and to allow its diversion into useful products, it has been found necessary to charge handlers for milk at prices which vary according to the uses made of the milk.

In order to attract an adequate supply from producers, the price for milk for fluid use must be higher than the price for milk in various non-fluid uses.

Each handler can be equired to pay this higher price for fluid milk only if th fluid milk sold by his competitors in the marketing area also costs the Class I price. In order to maintain the regulation in the market it is necessary that all milk entering the market area for fluid uses be priced.

The Study of Regulations includes this statement concerning the compensatory payment problem, on page 55:

> "Compensatory payments are those sums of money that must be paid into the market pool for that portion of the unregulated milk used in specified classes. The uses specified usually are those for which milk must meet health department approval. The purpose of the payment is to afford a means of integrating into the classification and pooling plans of regulated markets mi[illegible] which is otherwise unregulated."

The Federal Order Study Committee made several statements [264] concerning the problem which necessitates compensatory payments. These appear on pages eight and nine and 16 and 17 of Section II of their report:

> "After the establishment of this assumption of essentiality of market pooling in many major markets, the next question is why compensatory payments and assignment of classification provisions are considered to be needed in such programs. To understand this it is necessary to explain the problem with relation to coverage or incidence of a market pool order.

"In the first place, it becomes administratively essential to identifying the thing, i.e., the milk, to be priced; in other words, to define the coverage of the regulation.

"Secondly, it is readily apparent that manufacturers whose sales receipts necessitate a lower rate of return to producers will unavoidably be attracted to get under the market pool orders for the purpose of collecting equalization and raising their payments to producers but serving the fluid market as little as possible.

"Thirdly, under a market pool order every farmers' milk is directly affected by all the milk of each and every other farmer in the equalization pool. Total values amount to huge sums—as much as a million dollars a day under the New York Order alone. Such a [265] program must have hard and fast rules to be enforceable. Large equalization payments cannot change hands on a loosely drawn regulation."

That is the end of that quotation.

The following is another quotation from the same publication:

"Some very important market pool orders contain provisions for pricing milk shipped into their markets from plants which have not so operated as to meet the requirements for fully priced and pool plants."

"This is done by providing for a compensatory payment to the pool by the receiving handler of an amount fixed by certain rules as nearly as possible to bring his raw material product cost up to that of competing handlers getting their milk from fully priced and pooled sources.

That is the end of that quotation. Another quotation from the same publication is:

"The ultimate reason, derived from the above premises, for these payments is that the market pool

orders with classified price plans cannot be continued without them. Experience under the market pool order programs has led conclusively to forms of open, non-exclusive, operational methods of pool identification, as being the only fair and workable manner of designing [266] the regulations. Then the adoption of such method of pool plant identification has just as conclusively led to these payments as the only means of sustaining the programs on a basis of equal competitive opportunity to all handlers and producers."

Non pool milk under proposed order:

Milk from non-pool plants may be expected to enter the marketing area in two ways. Milk may enter as shipments to a handler from plants which for some reason do not choose to meet the pool plant requirements and participate in the pool.

Milk may enter also as packaged milk on regular retail and wholesale routes of a handler whose principal milk distribution business is outside of the marketing area. The milk which comes into the marketing area as shipments to handlers may come either from unregulated plants or from plants regulated by another Federal order.

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[268] Payments on Non-pool purchases of Handlers from Plants Regulated by Another Federal Order:

The problem of pricing this milk is not a difficult one. Prices for milk in other uses are established by another order and payments for milk will be subject to regular audit. The problem will be to price this milk at the same rate as milk obtained from pool sources. Such milk should carry the North Jersey Class I price if higher than the Class I price established by the other Federal order. In accordance with Federal order practice and for ease of administration [269] any price difference should be paid by the North Jersey handler and should be paid into the North Jersey pool.

Payment on Purchases by Handlers from Unregulated Plants:

Operations at unregulated plants may vary considerably. Principally, however, they will be engaged primarily in processing manufactured dairy products or primarily in supplying fluid milk to other markets. In either case the milk shipped to the North Jersey handler will be that which otherwise would have had a surplus use. A provision to require a compensatory payment on such milk at the difference between the North Jersey Class I and Class II prices, will price this milk at its alternative use value as far as the shipping plant is concerned.

Compensatory Payment Rates:

The Study of Regulations discusses rates of compensatory payments on pages 55 and 58 as follows:

> "The objective in selecting a basis for the rate of compensatory payment is to prevent the undermining of the classification and pooling plan in the market without unnecessarily discriminating against the unregulated milk. Usually, the rate of the compensatory payment is calculated from the difference between the Class I price and some other price so chosen as to make it reasonably certain that the non-pool milk would not [270] cost the distributor less than the Class I price under the market order.
>
> "One method of arriving at the rate of compensatory payments would be to find the unit cost of each non-pool shipment and set a rate which would equalize that cost with the cost of pool milk to the receiving handler. In practice, such costs as the market administrator might determine on the basis of invoices and payments might differ substantially from the real economic value of the milk at the point of first receipt from dairy farmers. Many handlers operate both regulated and unregulated plants. In the case of movements between such plants, the billing and payment represents

a mere bookkeeping transaction. It might be adjusted to avoid any compensatory payment without affecting company profits. Unaffiliated plants, by means of tie-in transactions or other arrangements, could adjust billing prices for the mutual benefit of both concerns. Such practices are difficult to detect and difficult or impossible to regulate.

"In view of practical difficulties in determining the real economic value of non-pool milk, shipment by shipment, a more general measure of value is used to calculate the rate of payment. The price most frequently used represents the value of milk [271] in manufacture of dairy products. This is based on the reasoning that the alternative use for an increment of milk seeking to enter the market must be a manufacturing use."

The Federal Order Study Committee summarized the rate of payment problem on page 16, Section II of its report,

"The establishment of this rate is admittedly a difficult matter. Generally speaking, it is fixed at the difference between the opportunity cost, i.e., probable return from other available outlets, and the full price."

The determination of compensatory payment rates as proposed for the North Jersey Order are in line with those discussed in the above quotations.

Examiner HYDE: Mr. Dolan?

By Mr. DOLAN:

Q. Does that complete your statement?

A. It does.

• • • • •

[409] Whereupon, HARRY P. YOUNG, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Examiner HYDE: Do all of the people present have copies of the statement Dr. Young is about to read?

They do, Mr. Dolan.

DIRECT EXAMINATION.

By Mr. DOLAN:

Q. Doctor, will you state your full name, residence and occupation?

A. My name is Harry P. Young. My residence is 65 Fieldsend, Rehoboth Beach, Delaware. My occupation is Economist for United Milk Producers of New Jersey.

• • • • •

[412] It is the position of our three groups that the entire territory within the boundaries of the 13 named counties in New Jersey should be included in a new and separate order and we are opposed to the addition of any area outside the State of New Jersey.

The Area Proposed Constitutes a Single Marketing Area:

Within the boundaries of the proposed marketing area are many communities all of which are closely related by a network of highways and transportation facilities. A large population lives within its confines and this population is steadily increasing. In general, the population trend is out from the metropolitan areas into the rural sections. The entire area has common marketing habits and similar facilities and constitutes but a single marketing area.

Distributors of Milk are in Competition Within the Entire Area:

Due to the network of fine transportation facilities some milk dealers distribute milk throughout the entire area.

Many of the handlers cover large portions of the State and within the entire area there is keen competition for milk sales. [413] This competition for sales is extending farther and farther into the more rural areas so that no portion of the area is free from competitive sales.

Within the rural areas are many lakes, streams, and state owned forests which furnish an opportunity for recreation. These portions of the area, although their permanent population does not compare with the metropolitan area is still a sizable milk consuming area and the population trend shows that these sections are rapidly gaining in numbers. During the vacation period, a large number of people go to the lakes and camps and there is keen competition for this sizable business.

The Proposed Boundaries Mark the Points of Least Competition:

The boundaries of this area, except for the southern line across New Jersey, mark the line of least competition between milk routes from within the area and milk routes from other areas outside of New Jersey.

In order to analyze the extent of distribution of milk from split routes across the boundary line of the 13 county area we obtained from the New Jersey Office of Milk Industry a list of over 175 milk dealers that were located near enough so that they could distribute milk on both sides of the line.

Sixty of these dealers and subdealers were located along the northern boundary between New Jersey and New York. [414] We canvassed these dealers to determine whether they distributed milk both in New York and New Jersey. These 60 distributors cover an area from Port Jervis over to Ramapo Mountains, a distance of approximately 40 miles. None of these 60 New Jersey dealers distributed any milk across the line into New York State. A number explained that in order to distribute in New York a license was required. None of them held such a license.

There are four large plants in Orange and Rockland Counties that bottle substantial quantities of milk which are moved into New Jersey in bulk shipment and there distributed to consumers. It must be pointed out, however, that this operation is only for the convenience of those who distribute the milk. The movement across the boundary line is a transfer of milk similar in character to a transfer of milk in a tank truck and is not a retail sale.

No Portion of the 13 Counties Should be Omitted:

The notice of hearing indicates that some groups propose that the most northwestern counties of Sussex, Warren and Hunterdon should not be included within the marketing area. To exclude these counties would leave this section of New Jersey unprotected and leaves the door open as a dumping ground for I-C and unregulated milk. These counties have the same marketing conditions as other parts of the area, and the need for an order exists within this portion of the area as much [415] as in any other portion. It would be unwise and improper to leave open any wedge to upset the success of proper evaluation. It also would present a problem of administration for there is no distinct boundary line along the eastern edge of these three counties that could be easily identified, while on the contrary, the Delaware River forms a perfect and easily identified boundary along the western limits.

* * * * *

[421] HARRY P. YOUNG, was recalled to the stand, and having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION—Resumed.

By Mr. DOLAN:

Q. Dr. Young, do you have a statement with reference to pool plant provisions?

A. I do.

Q. And attached thereto, are there certain tables marked Table one and Table two?

A. That is right, yes.

Mr. DOLAN: May I ask that the statement and the tables be marked for identification?

Examiner HYDE: The document with the tables attached thereto is marked Exhibit Number 38, for identification.

(Exhibit Number 38, marked for identification.)

Mr. DOLAN: May the tables be marked separately?

Examiner HYDE: I think we will carry them under the same number. And later you will offer Exhibit Number 38 for the tables, I assume. That is the way I have been marking all the others.

[422] Mr. DOLAN: That is all right.

By Mr. DOLAN:

Q. Will you proceed, Doctor?

A. These pool plant provisions appear in the Notice of Hearing, pages 2 and 3, Sec. 990.9, as proposed by the Governor's Milk Committee of New Jersey, United Milk Producers of New Jersey and Eastern Milk Producers Cooperative Association, Inc., Sec. 990.9 includes the subsections and paragraphs thereof (a)(1), (a)(2), (a)(3), (i), (ii), (iii), (iiii), (b) and (c). Sec. 990.10 (a) and (b) are complementary provisions for non-order plants.

Stated in simple language in order to be a pool plant it must:

1. Not be subject to another Federal milk order.

2. Hold a permit from the New Jersey State Health Authority for the sale or distribution of Class I fluid milk in New Jersey.

3. At the start of the order and anytime during the first 12 months of its operation apply for designation as an order plant and thereafter during June or July of any year apply for designation on the following August 1.

Applications for designation must, of course, be in good

faith and contain full information as to health permits, volume of milk in the plant and evidence of the ability and intention of the plant handler to make available [423] the full supply at the plant as fluid milk in the market.

4. Actually ship as Class I milk to the marketing area:

a. During August to November 60 percent of receipts from producers with no month below 50 percent.

b. During December, January, February and March 25 percent.

c. During July 35 percent. There is no shipping requirement for April, May and June.

5. Any handler operating or having control over several plants may qualify a number of these plants as a unit. This is to say that the total receipts from producers and the total disposal at all the plants may be combined in determining their qualifications.

6. In order to attain temporary pool status ship to the marketing area not less than 65 percent of receipts from producers during any month.

After qualification failure to meet these basic requirements will result in cancellation of designation.

The designation may be cancelled upon application, but such cancellation renders the plant ineligible for redesignation until at least one full year has elapsed.

At this time we should like to call attention to a special problem related to the ten bottling and processing plants outside the marketing area. We suggest that these [424] problems may be solved by suggested changes in the wording of Sec. 990.9(3).

There are several plants that bottle and distribute both in and outside the marketing area. One such plant sells about equal quantities inside and outside the marketing area. This plant could not possibly retain pool plant designation under 990.9(a)(3). There might be compensatory payments into the pool on about 50 percent of his Class I sales, and in consequence very low prices to producers.

Since this handler has a very high Class I utilization the benefits of which in any event would all accrue to order

plant producers, refusal to include for pool plant designation the Class I sales made in outside areas adjacent to the marketing area would be unjustified. There are at least four other plants similarly situated.

We suggest that there be added to Sec. 990.9(a)(3) the following subparagraph:

"(iiiii) To meet the provisions of this Section (3)(i)(ii) and (iii) a processing and bottling plant may include its own or subdealer route sales outside the marketing area up to 25 percent of milk received at such plant from producers.

The purpose of the provisions of this Section (990.9) are:

1. To provide definite and specific terms for [425] determining inclusion of plants and producers in the Northern New Jersey pool that are necessary for the successful operation of the order.

2. To limit participation in the pool to those plants that are willing to and do actually ship a substantial portion of receipts of milk from producers to the Northern New Jersey market for sale or distribution as Class I fluid milk.

3. To prevent uneconomic and disorderly shifting of plants from one market to another which will provide regular and dependable sources of milk for the New Jersey market.

4. To provide liberal enough terms to be consistent with the principle laid down by the Secretary that a separate order for Northern New Jersey "carry the surplus associated with its fluid outlets."

Estimate of Pool—Based on 1955:

It is impossible to obtain an accurate pool computation until the order has been in operation for at least one year.

These provisions will probably result in the inclusion of about 150 pool plants located in the marketing area with total producer receipts in 1955 of approximately 838 million pounds of milk and of about 10 bottling and distributing

plants outside the state, all but one of which [426] are located in counties adjoining the marketing area and of at least 40 other out-of-state shipping plants. Production by months in Northern New Jersey as reported by OMI for dealers and producer-dealers appears in Column 1, Table 1.

Examiner HYDE: Table one attached to the statement?

The WITNESS: Yes.

Examiner HYDE: I think you better say column one, table one, Exhibit 38.

The WITNESS: Of Exhibit 38.

Production for 35 out-of-state plants for which we have information plus an assumed additional 15 out-of-state plants with a total yearly volume of 300 million pounds appears in Column two, Table 3, Exhibit Number 38.

The additional production is assumed to be distributed by months as the actual production occurred in the 35 plants. The sum of the first two columns appears in Column three, Table 1, Exhibit 38. Sales of milk in North Jersey as reported by OMI are listed in Column four. The percentage that sales are of production appear in Column five. The total receipts from producers at 35 of these plants that shipped over 60 percent to Northern New Jersey during August to November 1955 was 688 million pounds. Since there are at least 15 more out-of-state plants which we believe will be Northern New Jersey pool plants the total receipts from out-of-state plants may be expected to have been 1955 approximately 988 million pounds.

[427] The total milk in the pool will be approximately 1826 million pounds. See Table 1, Exhibit 38.

Total sales of fluid milk in North Jersey as reported by OMI for 1955 from North Jersey plants including sales into Ocean County and all other areas was 1,282 million pounds. See Table 1, Exhibit 38.

Our study of the problem convinces as that the Northern New Jersey pool will average on an annual basis about 70 percent Class I and 30 percent Class II. The short production period is from August to November of each year. Class

I milk may be expected to average about 79 percent of receipts during this four month period. A rough calculation of assumed average at distribution and at shipping plants tends to confirm the 79 percent estimate. If all the pool plants have percentages of Class I that is evenly distributed from 60 to 100, then the averages would be 80.

It would be unreasonable to contend that the 60 percent shipping requirement for August to November is too severe. Certainly plants that are unwilling or unable to ship at least 60 percent of receipts as Class I milk during the short season of August to November are not entitled to the benefits of the pool and they have no legitimate place as Northern New Jersey Order plants.

The 60 percent requirement has substantial precedent in Sec. 927.27 of New York Order 27. Plants that [428] ship 25 percent during July to March and 10 percent from April to June are automatically designated as pool plants but no plant may be a pool plant for the months of April to June on the 10 percent basis "unless 60 percent during the preceding period of October to December of such milk was classified as Class I-A."

A report by the Boston Milkshed Price Committee dated September, 1947, last paragraph on page eight and first paragraph on page nine came to the conclusion that "Careful studies of daily and weekly variations in market receipts and in Class I sales indicate that a reserve or safety margin equal to 15 percent of total receipts is the minimum necessary to insure an adequate supply of milk at all times in the month of shortest production."

On the other hand, "when the amount of Class II milk in the 'shortest' month of the year exceeds 25 percent of total receipts from producers, the supply of milk is more than adequate to meet the fluid milk needs of the market."

Examination of the Study of the Dairy Industry—Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture—House of Representatives, Serial M. Part 1, the table on page 80 subtitled—Utilization percentages in Federal Order Milk marketing areas—Milk

used in fluid form as percentage of milk received from producers by months, 1954—shows that of 53 Federal Order milk marketing [429] areas 22 had higher utilization of Class I milk in August and 38 of 53 had higher Class I utilization of Class I utilization in November than we have estimated for Northern New Jersey.

In Table 1 of Exhibit 38, the 35 out-of-state plants, the production of which was known, did ship during August to November, 1955 over 60 percent of producer receipts to the Northern New Jersey area.

The 15 other out-of-state plants made substantial shipments to Northern New Jersey. However, they did not ship 60 percent or more of producer receipts from August to November.

We believe all of these 15 plants can and will qualify as pool plants. Some of them are operated by handlers who operate other plants from which most of the receipts are shipped as fluid milk. All of these plants operated in handler units, we believe, could and would qualify as pool plants.

Others became New York Order pool plants on a shipping basis for October through December with the evident intention of becoming New York pool plants during April to June in 1956. In former years, these plants have shipped most of their receipts into New Jersey.

Still other plants were operated by handlers who shipped some milk from a large number of plants. If the [430] operator desired, concentration of such shipments into a smaller number of plants would qualify them as pool plants.

In Table 1 of Exhibit 38, you will note that the month of Highest production is May and the lowest August. Production in May over August was 30 percent in New Jersey plants, 59 percent in out-of-state plants and 45 percent in all plants. Class I sales were 84 percent of receipts in August and 57.5 percent in May.

The data in table 1, of Exhibit 38, we believe to be a

reasonable approach to the Northern New Jersey pool operation. The actual pool data will, of course, vary from our approximations.

We now call attention to the percentages of Class I milk by months in relation to the principle that the Northern New Jersey pool should carry the surplus associated with its fluid outlets. It appears that such a pool would furnish an ample supply of fluid milk throughout the year.

• • •

[1047] What do you consider the milkshed to be for Northern New Jersey, geographically?

A. The area in which plants are located which currently supply a considerable portion of their milk to North Jersey.

Q. Well, that is a rather general statement, isn't it? Where are these plants located?

A. Some of them are located in Pennsylvania, a good many of them are located in New Jersey, some of them are located in New York State.

Q. The producers in all of the State of New Jersey cannot be considered in the milkshed for Northern New Jersey because central and southern New Jersey have to be taken care of, too, isn't that right?

A. That is correct.

Q. So what portion of the total milk supply coming into New Jersey do you, as an economist, believe should belong to the New Jersey part of the milkshed? And what portion should belong to the Pennsylvania and New York part [1048] of the milkshed?

A. Would you read the question, please.

(The reporter read from his notes as requested.)

The WITNESS: I don't know whether I can answer it or not. Would you mind restating it for me? You speak of milk coming into New Jersey and then what part of that belongs to New Jersey and so forth. Couldn't it be clearer?

Mr. DANIELS: Maybe so.

By Mr. DANIELS:

Q. You testified that part of the state of New Jersey and part of Pennsylvania and part of New York make up the milkshed for Northern New Jersey.

A. That is right.

Q. I would like to know what percentage of the milk that is necessary for Northern New Jersey should belong to the Northern New Jersey portion of the milkshed and what portion should belong to the part of the milkshed that is without the confines of New Jersey. Maybe I better ask a preliminary question.

A. No.

Q. You have it?

A. I have your question. If you don't mind, let me think about it just a moment.

Q. Yes, sir. That is the kind of answers I like.

A. Of course, New Jersey has been a rather chaotic market [1049] for a considerable period of time, and there is perhaps considerable distortion in the supply area at the present time and they are not what one would expect to exist were this a more orderly market than would be the case if it had regulation such as the groups are proposing. So it would be very difficult for me or, I think, for anyone else, to say exactly what milk would be attracted to the New Jersey market and become a part of that regulated by this order. Of course it would be, I think, inappropriate for me to say what milk should be a part of this order. But I can give you a general statement, I think, that a large share of the milk produced in Northern New Jersey would be used in the New Jersey market as fluid milk, would be in this pool, not necessarily all of it, that then this might constitute as much as 40 to 50 percent, roughly, of the total supply of milk in the area.

The remainder of it would be expected to come partially from plants that now regularly supply the market from Pennsylvania, New York, but that there might be other plants in the same area which are not now supplying con-

siderable quantities to New Jersey that would come in under the New Jersey pool, the North Jersey order.

Q. Do you know what share of the milk, what percentage of the milk consumed in Northern New Jersey is now produced by New Jersey producers?

[1050] A. Not exactly.

Q. Wasn't that one of the things that you considered when you prepared your proposals and your statement?

A. What share of it——

Q. What percent of the milk used in Northern New Jersey came from New Jersey farmers.

A. Well, it has been somewhat less than 50 percent. I presume we considered that in the sense that we were all aware of that percentage as a general figure.

Mr. WINTON: Mr. Presiding Officer, I move to strike out the answer of the witness, that the share of the New Jersey producers has been somewhat less than 50 percent, as there is no probative evidence in this record that that is so, and that remains to be seen.

Examiner HYDE: He says it is so, himself.

Mr. WINTON: Well, I think that a statement without supporting statistics should not be received at this time.

Examiner HYDE: I will let you cross-examine him on it when you get to cross-examination.

By Mr. DANIELS:

Q. Didn't one of your witnesses put something in on that subject?

A. I hope so.

Q. I show you the prepared testimony of Dr. Waller. I will read it to you. He says, "New Jersey producers not [1051] under Order 27, in 1953 produced 46.2 percent of the milk that was used in Northern New Jersey, and Order 27 I-C was 22.6 percent, and out of state milk was 31.2 percent."

So some of this Order 27 I-C milk would be milk produced by New Jersey farmers, wouldn't it?

A. Yes, I think so.

Q. From those figures, as an economist who studied this market, wouldn't you say, then, that over 50 percent of the milk used in Northern New Jersey is produced by New Jersey farmers?

Mr. WINTON: The same objection.

Examiner HYDE: Overruled.

The WITNESS: About 50 percent, I believe, is the correct figure.

Mr. KRAUSE: For what year would that be?

By Mr. DANIELS:

Q. For what year? Now?

A. I would say for one of the recent years.

Q. And you have no reason to believe that it isn't so now, would you?

A. I believe the proportion is supplied by New Jersey farmers has been decreasing.

Q. Wouldn't that be natural and will that not continue even though there is an order?

A. I think it is highly possible that it may continue. [1052] Q. Well, the population of Northern New Jersey is increasing, isn't it?

A. That is right.

Q. And the dairy farm land of New Jersey is not increasing and there is no way for it to increase?

A. That is the reason I think it is possible that that would continue, yes.

Q. Yes, so that that is going to continue whether there is an order or not an order?

A. I presume so.

Q. These percentages that we were just talking about, do they have anything to do with this chaotic market that you speak about?

A. Do the percentages have anything to do with the chaotic market?

Q. Well, the percentages that we were just now speaking about, the percentage of the milk furnished North

Jersey by North Jersey producers. Does that have anything to do with the chaotic condition that you spoke of?

A. The pricing of these percentages has something to do with the chaotic market, yes.

Q. The pricing of which part of this milk has something to do with the chaotic conditions?

A. The pricing of all of it at different prices, that which is produced within the State of New Jersey and regulated [1053] by the Office of Milk Industry being priced differently than milk regulated by Order 27 and sold as I-C milk in Northern New Jersey, again contrasted with the other milk which is unregulated and generally priced at the approximate blend of Order 27.

Q. If the I-C price were raised to equal the OMI price, then there would be one factor of this chaotic condition you speak of removed, wouldn't there?

A. I would believe that if the I-C price were raised to be more nearly a fluid milk price, whether it was the OMI price or not, would remove part of the chaotic condition unless, at the same time, the I-C sales stopped and were replaced by an equal amount of unregulated milk, which might very well happen, but in which case it would not make any great contribution to removing chaotic conditions.

Q. Doctor, on the unregulated milk, if a fluid price were paid for the milk that you call unregulated, that, of course, would remove the other factor, wouldn't it?

A. If a fluid price, something more nearly in line with the New Jersey Class I price, were paid for this unregulated milk, it would remove most of the chaotic conditions.

Q. And do you know what price is actually paid?

A. For the unregulated milk?

[1054] Q. Yes.

A. Not exactly, no.

Q. The fluctuations that you speak of here, you speak of ten percent in excess is necessary because of the variation in demands. Do you think that is so, that the variation in demand would call for a ten percent excess? Or is it more

the variation of production that calls for more milk in a month by about 20 percent than our Class I sales?

A. I was quoting a statement contained in a publication written by Dr. Gaumnitz and Mr. Reed. And it was written in the year 1937. I would take their statement as having considerable value since both of them had been in the Dairy Branch and had had lots of experience with these markets. I would think that there is some possibility that there may have been some changes since 1937.

Q. You think there is a possibility?

Examiner HYDE: Let him finish.

The WITNESS: But not of great magnitude.

By Mr. DANIELS:

Q. Doctor, are you seriously adopting their 1937 study and then telling me that you don't believe there have been many changes in the buying habits since 1937?

A. I would answer the first part of your question yes and in the second part I don't know quite what you are meaning.

Q. What I am meaning is this: As an economist, you [1055] don't hold to the theory, do you, that the buying habits and the variation in buying a staple product like milk is the same today as it was in 1937 when we were in the recession after we had tried to come out of a depression, and hadn't gotten out, and now everybody has money?

A. Mr. Daniels, I would point out to you that milk was a staple, necessary food in 1937, just as it is in 1956. Milk itself has not changed greatly. I am not sure at all that the buying habits of consumers greatly affect the fluctuations that might occur in milk sales from day to day. There might be some effect, but I don't believe it would be of very great magnitude. So I would be willing to accept your ten percent as being fairly descriptive of conditions today.

Q. Let's let it go, that you did not make an investigation

yourself. Did you? This is based entirely on Dr. Gaumnitz' statement of 1937?

A. Very obviously. I don't make any claim at this point to have made an investigation, no.

Q. Your committee has certain proposals about pool plants, and you have stated that you believe that the proposals that have been introduced will correct the chaotic condition in this market. Do you believe that plants located outside of the State of New Jersey that have either handled the surplus and at times shipped in fluid milk, and then maybe not for long periods of time, have become [1056] part of this market and should remain so?

A. Again, you get a question that is so long I certainly can't answer the whole of it very directly.

Q. You can carry that question of mine, Doctor, I am sure.

Mr. POLIKOFF: May I have the question re-read, Mr. Presiding Officer?

Examiner HYDE: Will the Reporter read the question?

Mr. DANIELS: I will withdraw it and restate it.

Examiner HYDE: It is withdrawn and Mr. Daniels will re-state it.

By Mr. DANIELS:

Q. I understood you to say a moment ago that this milkshed should rightfully be that territory from where milk has, in the past, been coming into Northern New Jersey. Now, forgetting price for a moment, that made up the milkshed, and that that was correct. That is what you said, didn't you?

A. Certainly not with that degree of finality that you expressed stating it.

Q. An economist never speaks with the same finality lawyers do. You put in your terms what you meant to say.

A. What I did say, I think, was that this market was distorted, and quite probably the milkshed at the present time, due to the chaotic conditions in the market, [1057] and

that I would not expect that all of the plants which in the past had shipped milk irregularly to the North Jersey market would necessarily become pool plants if the market were under regulation; but, in general, in a general sense, that the milkshed of the North Jersey market does correspond with the location of the plants which have regularly supplied milk to the North Jersey market.

Q. Should those plants which have regularly supplied milk to the North Jersey market remain as pool plants or should they become pool plants if there is an order written?

A. Again, I don't believe I have any way of saying that they should or should not. I think that that is a choice that is up to the operators of those plants. I would think in a good many cases the economics of the situation would be such as to cause those plants to become pool plants under the North Jersey order, not necessarily all of them.

Q. But if they have been plants helping regulate the supply to North Jersey with milk, then the proposals should not be written in such a way as to deny them pool privileges or to impress upon them a completely different method of doing business, should they?

A. In this sense only: The proposal should not be written in such a way as to deny them the opportunity to [1058] become pool plants. With that I entirely agree. It is very possible that if this market were regulated and all the sources of milk priced equally, that some plants supplying the market, because of chaotic conditions, would not then choose to become regular suppliers of the market.

Q. Oh, but, Doctor, do you believe that proposals should be adopted into provisions of an order which would cause some operator who has operated for 10 or 15 years or longer in a certain manner in regards to Northern New Jersey to change his method of operation or not be in the pool if he has been, as you stated, a plant that has regularly furnished milk to Northern New Jersey or has taken care of the surplus?

A. I wouldn't change my previous answer. I might elaborate by saying that I think that any plant that has regularly supplied Northern New Jersey with a considerable portion of its milk for 10 or 15 years would choose to become a pool plant under the North Jersey order and would be able to meet the pool plant provisions of the North Jersey order.

Q. A plant out in the country may be serving the Northern New Jersey order without shipping 40, 60, 25, or 10 percent of its milk in here for Class I utilization in any months, isn't that so? They may be doing so by handling surplus and shipping it when it is needed?

[1059] A. Or they might be in this market because of chaotic conditions have made it possible for them to move what otherwise would have been surplus milk into this market.

Q. How long do you say this market has been in this chaotic condition?

A. I would say since the end of the war and getting progressively worse.

• • • • •

[1061] Q. What is the blend price that the North Jersey producers get for milk right now?

A. I don't know.

Q. You what?

A. I do not know.

Q. What was it a year ago?

A. I do not know exactly.

[1062] Q. What is it compared to what New York producers get who ship under Order 27?

A. It is a higher price.

Q. Higher. How does it compare with the blend prices the Pennsylvania producers get?

A. It would be higher than the blend prices received by some of them and lower than others.

Q. Well, on an average in the milkshed, in the North New Jersey milkshed, how does it compare with the prices

the Pennsylvania producers get who ship into some Pennsylvania milkshed?

A. Some Pennsylvania producers that ship to large Class I handlers get very good prices. Others that sell to handlers that have a considerable amount of surplus do not get as good a price.

Q. Well, on an average.

A. I don't know what the averages are.

Q. That you don't know. Do you anticipate that an order is going to increase the blend price to the New Jersey producers?

A. I would anticipate that it would stabilize the blend price to producers and prevent it from being pushed down lower, and in a good many cases probably increase the blend price.

Q. What is the Class I price here now?

[1063] A. $5.47. It is scheduled to rise later in the year.

Q. That is for 3.5 milk. It would rise 40 cents so that would be $5.87?

A. That is right, if it is scheduled to rise 40 cents.

Q. When? July first?

A. I think that is correct.

Q. You are the expert in this market, you know, and I am not. It is scheduled to rise again in October?

A. I believe that the schedule is such that it would rise again in October. However, that is a considerable distance away.

Mr. Polikoff: Can we have the record show what market is being discussed now?

Mr. Daniels: Northern New Jersey.

Examiner Hyde: Northern New Jersey, Mr. Polikoff.

Mr. Winton: May the record show that that is the OMI price that is being mentioned?

Examiner Hyde: Are we talking about OMI prices?

Mr. Daniels: Yes, sir.

Examiner Hyde: Go ahead.

By Mr. DANIELS:

Q. What is the Class I price under Order 61 now?

A. I am not sure.

Q. It is 25 cents lower than the Pennsylvania State [1064] price, isn't it?

A. Not right at the moment. The first of July, I believe, that the Federal price in the Federal order would increase 60 cents.

Q. Well, Doctor, how can you conclude that this market is in a chaotic condition when you don't know what the blend prices are in Northern New Jersey now as compared with a year ago?

A. I don't believe it is necessary, Willis, Mr. Daniels, for me to remember the exact prices all the time, to have studied them and come to the opinion that chaotic conditions exist and have existed in the recent past.

Q. Doctor, it is hard for me to follow this, that if the blend price here is higher than it is in New York, where there is a Federal order, and higher than many of the shippers get for milk in Pennsylvania, how you conclude that that is chaos or that the farmers prices are slipping. That is the only time that an order is justified, and the terms of an order must follow the general purposes of the statute.

A. Yes. I think I see some basis for your confusion.

Q. For my what?

A. Some basis for your confusion. You said you were confused.

Q. Yes, all right. I don't mind being confused if I have [1065] a reason to be.

A. The prices which I was thinking of in answering your question as far as New York order prices are concerned, for those in the 201-210 mile zone as compared to those in North Jersey, North Jersey is an area much closer to the market, and there is much more reason for prices being higher here, and if they were the same here as the average in the New York milkshed or the average in Pennsylvania,

and were tending to decrease relative to these other prices, I think that would very obviously be resulting from some sort of chaotic conditions. It would be a poor situation for the farmers.

Mr. DANIELS: Would you read that back to me, please?

Examiner HYDE: Will the Reporter read the answer, please?

(The reporter read from his notes as requested.)

Mr. WINTON: Mr. Presiding Officer, I move to strike the answer because I think it was clear from the witness' answers before that he was referring to the Order 27 price in this area. I think to now drag in the question of what they are in the 201-210 mile zone, or as a general average, is just confusing the issue.

Mr. DANIELS: I was going to come to that next.

Examiner HYDE: I will deny the motion to strike.

[1066] By Mr. DANIELS:

Q. Now, Doctor, they aren't tending to decrease below the blend price the New York farmers are getting who are located nearer to the market than the 201-210 mile zone, are they?

A. Are not tending to decrease?

Q. Decrease. That is the term you used.

A. I would say that for many individual dairy farmers, they have in the past several years tended to decrease.

Q. Well, is that because they happen to be shipping to a handler who has a low class I utilization?

A. I would say it was due to the fact that the prices for milk produced in North Jersey were established by the Office of Milk Industry, and the Office of Milk Industry nor no one else regulated the price of this milk coming in from out of state, and it being sold at a blend price or available at a blend price was tending to take away and disrupt the market in North Jersey.

Q. Well, what you are saying is this, Doctor, if all the

Class I milk came from Northern New Jersey producers so far as they could furnish it, and they got Class I milk for it, they would get a higher price. That is what you are saying, aren't you?

A. Well, I am saying that there was some loss of markets to North Jersey producers because dealers were able to buy [1067] outside the state unregulated for fluid use at blend prices.

Q. Or is it because they have to go outside in order to get a sufficient supply of milk? You just told me that awhile ago. They have to look outside the State of New Jersey to get the supply of milk.

A. Yes. There are other reasons why dealers buy some of their milk outside of North Jersey.

Q. All right. We are going to leave it with this one question: They are getting a higher blend price, these Jersey producers, than their neighbors, aren't they, that are shipping into other markets?

A. They are getting a higher blend price than Order 27, than the Order 27 blend, yes.

Q. And higher than many producers shipping in Pennsylvania to some dealer?

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[1106] Q. But if an operator, who is qualified and wants to remain qualified for the pool must ship 60 percent of his total producer receipts into the market as Class I, you are then limiting the market for the Class I milk of the Class I operator without manufacturing facilities, aren't you?

A. Yes. What actually happens is that there is a tendency to limit the market to the milk that is actually needed by the market. We think that is what should happen, that the market pool should not be burdened with a lot of milk that is not needed in the marketing area.

Q. But that milk is needed by your own testimony, because you said to have an adequate supply of milk, the Class I utilization should be about 83.3 percent of the

producer receipts, which means the producer receipts are [1107] 120 percent of the Class I use. Now, if that is so in the short season, it has to be greater than that, we will say, in February and March, doesn't it?

A. Depending, of course, on the seasonal variation. This 60 percent applies in August, September, October and November.

Q. That is right.

A. And in February and March it would be only 25 percent.

Q. That is right. Now, then, the seasonal variation between the short season and the flush season in that part of the milkshed that is necessary to furnish Northern New Jersey with its needed milk is much greater than the variation is among New Jersey producers?

A. It is greater, on the average.

Q. I think you said that the variation is 59 percent in Pennsylvania, or outside of New Jersey, is that correct?

A. Well, I am trying to find what I said.

Q. Look at page four of your prepared statement, identified as Exhibit 29, under seasonal surplus.

A. The extreme is 59 percent.

Q. As compared with the extreme of 31 percent in New Jersey?

A. That is right.

Q. Now, then, the operator who has plants out in [1108] Pennsylvania which are servicing this market and are needed, has to take care of a larger shipment of Class I milk because his seasonal variation is higher, isn't that right, than one who would have a country plant just in New Jersey, getting milk from New Jersey producers?

A. I am not sure I follow the question.

Q. Well, it is this: If there is a country plant located in New Jersey, that country plant can expect no greater variation than 31 percent.

A. On the average.

Q. Yes, that is what I am talking about. And, therefore,

if it is to be a pool plant, 60 percent of it has to be used as Class I.

A. That is right, in this four months.

Q. In the four months. And 25 percent in some months and 35 percent in July, and none in April, May, and June, right?

A. That is right.

Q. Now, a plant in Pennsylvania will expect a variation of 59 percent?

A. On the average, yes.

Q. On the average. So that that plant in Pennsylvania then has to relatively find a market for more Class I milk than the country plant in New Jersey, doesn't it?

A. I think I see what you are driving at, and it sounds [1109] reasonable.

Q. Thank you. You mean my question is reasonable?

A. Yes, and the point you are——

Q. You try to explain to me why that should be when 50 percent of the milk has to come from Pennsylvania and New York, according to your own statement, in order to supply Northern New Jersey.

A. Well, his sales of Class I at 60 percent in the four months would give him very close to 35 percent even in the peak month of production. Of course, the proposal in the order is that he doesn't have to ship any Class I milk in those peak months, April, May and June.

Q. How did you get that 35 percent? What calculation did you make?

A Well, I took 60 pounds out of the 100, and I increased the 100 to 159, and left the 60 as it was.

Q. And then worked that back into percentages?

A. That is right.

Q. But the fact remains that that handler with plants in Pennsylvania will have to find use for seven percent more Class I milk than if he were operating a country plant in New Jersey with just New Jersey producers, because his variation is 28 percent greater and 25 percent of 28 percent is seven percent. That is a fact, isn't it?

A. I don't follow you around that one.

[1110] Q. Don't you? Well, the difference between 59 percent and 31 percent is 28 percent?

A. That is right.

Q. So he has a 28 percent greater variation than does the New Jersey country plants?

A. 28 percentage points, really.

Q. Yes, 28 percentage points. Now, he has to ship 25 percent of all his producer receipts, so he has got a 7 percent greater burden on him than the other country plants.

A. You are talking about the extreme variation in production which applies to the month of May. Yet you are using the percentages which apply in the months when there is not that great variation. There may be something to the point which you were making.

Q. You give me the variation.

Examiner HYDE: I don't believe he has finished yet.

The WITNESS: But it is not of the magnitude that you were suggesting by using these percentages which apply today. Furthermore, it is our feeling that plants which have extreme variation in production and producers which have the extreme variation in production, are not anxious and willing to gear their production to the market needs. It would seem to me that there is no reason for making [1111] it as easy for those plants to operate in connection with this market as it is for other plants and producers who have adjusted their production to the market needs.

By Mr. Daniels:

Q. Well, now, Doctor, there might be something to that. That has more application where you don't need that outside milk. But in this state you need it. That is part of the milkshed, isn't it?

A. That is milk that is needed, and under the operation of the New Jersey order, with the proposals that we have made for a base plan, I believe, without much doubt, there

is no doubt in my mind, that that milk will become more uniformly produced.

Q. We are going to get on that base plan in a minute. But let me ask you this: What is the variation between March and November in New Jersey and outside of New Jersey?

A. I don't have the figures here.

Q. It may vary between the two localities more than 28 percent in those months, may it not?

A. It is possible.

Q. All right. Now, if, because of this variation the plant should lose its pool status, then you want compensatory payments paid into the pool—and I am coming to that in a minute—into the pool for all the Class I milk [1112] shipped in here, don't you?

A. Well, I am not anxious, certainly, to merely catch somebody, at 34 percent and therefore pick up some money for the producer settlement fund through a compensatory payment. That is certainly not the objective.

Q. Well, it does, doesn't it?

A. It would, if that handler did reach that figure, yes.

* * * * *

[1116] Q. Did you not find that the vast majority of the milk sold in Northern New Jersey comes through receiving stations, with many of them located in the zero to 50 miles?

A. Well, there is a considerable part of the supply for North Jersey that comes through receiving stations located within the zero to 50 miles zone.

Q. Yes. And I take your correction, because on the vast majority of milk, I meant through receiving stations some of them within the zero to 50. A very small percentage is what we would call direct shipped milk without a receiving station intervening, isn't that so?

A. I am not sure of your adjectives with which you qualified that, but there is milk that is received direct shipped

at processing plants. It does not by any means constitute half the milk supplies.

Q. Much, much less than half, isn't it?

A. Considerably less.

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[3576] Q. In order to determine the proper seasonal pattern of production for New Jersey, shouldn't you take into account the additional plants which supply Northern New Jersey in the short season?

A. Well, if one were going to have the exact figure of the seasonality of production of plants that would be in the New Jersey pool, one would have to wait until he had the New Jersey pool and then calculate it from the [3577] plants that were actually in the pool. This, it seems to me, is a good indication of what the seasonality of the majority of those plants would be.

Q. I developed this at some length. Tightening up the New Jersey pool will force a lot of plants which presently supply some milk to North Jersey out of any New Jersey pool, would it not the shipping requirements, for instance? They would have to ship more milk into North Jersey to qualify than they have in the past?

A. I don't know what you mean tightening up the New Jersey pool. There isn't any such a thing. There is a proposal here. The proposal as I have stated before, is such as to not encourage a large amount of surplus milk to be dumped on the market that is actually not needed to adequately service the fluid sales in the market.

Q. Don't you envisage as an expert that a lot of plants which are currently shipping milk from time to time into North Jersey would be unable to qualify under the pool plant provisions which you are recommending?

A. I believe there are a considerable number of plants that do ship occasional small quantities of milk into North Jersey. They would not qualify under the pool plant requirements which are proposed.

Q. What will happen to these plants if they can't qualify under the pool for New Jersey?

[3578] A. Well, some of them might qualify, and those that didn't qualify would have some other status.

Q. What do you mean by that, unregulated?

A. They might be unregulated. They might be Order 27 plants. They might be Philadelphia order plants.

Q. Well, you cast the burden of surplus associated with those plants on some other producers than those supplying the North Jersey pool which you propose to set up.

A. I would repeat again that our objective in these proposals was to attempt to establish a pool which would regulate the handling of fluid milk in the North Jersey market, and an adequate supply of surplus milk to service those fluid sales.

Q. Will you refer to your statement, Exhibit 29, page 4? I call your attention to the statement which appears under the caption "Periodic surplus," the second sentence. You say in 1948 the fluid milk markets in the northeast were characterized by supplies closely in line with market needs. Do you see that sentence?

A. Yes.

Q. Was that true of the North Jersey area as well?

A. Well, I don't know how you would arrive at an answer as to whether it was or not.

Q. When you state that here, you assume that to be [3579] true, don't you?

A. I assume that as a total of the markets of the northeast had their supplies somewhat in line with market needs.

Q. Isn't it also true that the number of plants with Jersey health approval has not changed substantially from 1948 to date? Have you had occasion to look into that?

A. My impression is that it has not changed substantially.

Q. If, in 1948, New Jersey had to draw on all these approved plants in order to get an adequate supply, why should any of them be excluded from the pool so that the North Jersey pool would not be obligated to carry the proportionate share of the production at those plants today?

A. I don't believe the North Jersey market had to draw on all of these plants to get an adequate supply, not all that were approved. My impression is that there has been a considerable, greater volume of milk actually approved as far as the health department is concerned than was actually needed to supply the North Jersey market.

Q. Isn't it true that during the first half of the year 1948, that the North Jersey market had to draw on all these plants and even sought supplies from other [3580] plants which got even temporary-temporary approval?

A. I don't believe it is true that the North Jersey market was receiving all of the milk from all of the plants approved for the North Jersey market in the first part of 1948.

Q. I didn't say that. But they had to draw on all these plants in order to get an adequate supply, didn't they?

A. I don't know. If they had received the supplies, total supplies, from a part of those plants, I presume they would have had an adequate supply without drawing on the others.

Q. But as matters stood in 1948, the plants which had New Jersey health approval were all called upon to ship milk which was needed in the marketing area now proposed as the North Jersey marketing area, weren't they?

A. I don't know whether they all shipped or not. I don't know what you mean by called upon to ship. I think without question that had a part of those plants sent their entire supply into the market or a large percentage of their supply into the market, there would have been an adequate supply.

Q. But my question was whether North Jersey had a sufficient supply as conditions stood in 1948 just with the health approvals on plants in 1948.

[3581] A. I am not sure that I understand the meaning of these various words you are speaking of as an adequate supply.

Q. Well, I will use your words. You say the fluid milk markets were characterized by supplies closely in line with

market needs. The fluid milk supply for North Jersey would, as things stood in 1948, be drawn from plants having New Jersey health approval, would it not?

A. Yes.

Q. And doesn't your statement indicate that the supplies then were closely in line with the market needs in New Jersey?

A. My statement indicates that the markets in the northeast, as a group, had supplies closely in line with the fluid milk sales.

Q. And you intended, since your statement deals with the North Jersey market, to have the inference drawn from that, that that was likewise true of North Jersey, and you on that basis built up an argument, did you not, in your statement, in the paragraphs which appear under the heading "periodic surplus"?

A. Well, there was no New Jersey pool at that particular time, so I think your statement of my intentions is quite wide of the mark and misleading. What I intended [3582] to say and I believe I do say, is that in the area as a whole, at that time, there was a reasonably close alignment of production and sales, and New Jersey was supplied with milk at that time.

Q. In fact, it was somewhat inadequately supplied during the first six months of 1948, and had to give provisional health approval to other milk supplies, didn't it?

A. That does not mean but what the plants that were approved, if they had chosen to ship milk to North Jersey, would not have supplied an adequate amount.

Q. Let me ask this: In view of the fact that in 1948 there was, you say, a balance of supply and market needs, and then you go on to say that since 1948 milk production has increased more rapidly for the region as a whole than has population, wouldn't that indicate that the supply at the plants which was adequate in 1948 has now increased to where it is much more than adequate?

A. Well, I think it would mean just what it says, that the production of milk has increased in most areas of the

northeast more since 1948 than has the use of milk for Class I in various markets in the northeast.

Q. Let me try it this way: Assume, and I think it is a fair assumption from what you say here, that in 1948 there was a supply of milk approved for North Jersey closely in line with market needs. Make that assumption. Let's [3583] assume that is a hypothetical assumption. Wouldn't it be true, on that assumption, that those very plants would today have a much greater volume than they had in 1948?

A. Well, I am rather hesitant about accepting your assumptions. There were one or two that I assumed the other day, and as near as I can find the facts they don't bear out your assumptions.

Q. I will give you a chance. I think we have more to show that the assumptions were 100 percent correct, and if you bring it up we will show you that, too.

Examiner HYDE: The witness doesn't want to accept the assumption, Mr. Winton. Let's go on to something else.

Mr. WINTON: Mr. Presiding Officer, an expert when examined about a fact is supposed to accept the assumption. I am not asking him to say that this is true. I am asking him to make this assumption, and then on that assumption I am asking his opinion as to what happened to the volume at these plants which were adequate in 1948. I think that is a perfectly fair and simple question which Dr. Pierce can testify to, and I think he can say that his statement indicates that the milk production at those plants has increased greatly.

By Mr. WINTON:

Q. Is that not correct, Dr. Pierce?

A. I forget what the assumption was you wanted me to [3584] make.

Q. The assumption I would like you to make is that the supply in 1948 at plants having health approval for New Jersey was in line with the market needs. Make that as-

sumption. Now, based on that assumption, wouldn't it also be true that the supply from those plants would have increased much more than the population?

A. Well, I don't see why we need to make any assumption like that in order for you to ask that question. As I have stated here, and I have stated already in answer to another question, the supply of milk has increased in most of the areas in the region, and I presume without question that if you take any group of plants in most any area of the northeast you would find an increase in production of those plants, in receipts.

Q. If New Jersey had to draw on these New Jersey approved plants in 1948 and because of increased production these plants now have a much greater volume, is there any justification for saying that that increased production associated with these plants which supply New Jersey is not a burden which ought to be borne by New Jersey producers?

A. If it were true, which I don't believe it is true, that New Jersey required all of the milk from these plants, or anything like all of the milk from these plants, then [3585] I would agree that New Jersey should be responsible for the increased production at those plants.

Q. Wouldn't it be true that even if you had limited the number of plants which shipped in 1948, those plants would probably have a much larger production in 1955 and 1956 than they had in 1948, and that surplus ought to be associated, at the minimum with the New Jersey pool, regardless of whether it is more than the minimum of 20 percent surplus which you have referred to in your statement?

A. Not necessarily. There could be a lot of other factors that enter into the situation. For instance, one of those plants may have been an Order 27 plant. There may be provisions in Order 27 that encourages the shifting of producers to such plants. I don't think it is necessarily equitable to assume that the North Jersey order should go back and pick up the responsibility for all that milk.

Q. Let's look at the way you formulate these proposals. In order to qualify as a pool plant during August, September, October and November, 60 percent of the total receipts from producers must be shipped to the marketing area, with certain provisos, is that correct? That appears on page 3 of Exhibit 4-A.

A. I assume you are reading from the notice of hearing?

[3586] Q. That is right.

A. Not skipping any words, I would say it is probably right.

Q. Now, assume that this order which is now proposed by North Jersey had been put in effect in 1948, and the plants that were in the pool complied with that. Hasn't the increase in production per day per dairy been such that some of the plants then in the pool would have been forced out because there would not have been sufficient increase in Class I consumption to make it possible for them to qualify in 1956?

A. I don't believe that is true. If it is true, then this 60 percent is too high a figure.

Q. You don't intend to make it necessary for plants to get out as production increases at the plants beyond the fluid requirements for the North Jersey market?

A. If there is what I call a periodic surplus, developing in the area, I believe that the New Jersey order should take its responsibility for a certain share of that surplus.

Q. At page four, at the bottom of the page, you say in North Jersey markets, fluid milk sales are likely to have increased more rapidly than milk production in North Jersey. What is the basis for saying that that is likely to have happened?

[3587] A. The same basis it was two weeks ago Friday, as is explained in the paragraph, that the population of New Jersey has increased faster than the production of milk in New Jersey.

Q. That is the only basis for that statement?

A. It seems to me that is a very good basis for that statement. Contrary to what you stated the other day, the per capita consumption of milk in North Jersey as reported by the United States Department of Agriculture, has increased rather than decreased, since 1948.

Q. I changed that. But when I asked the question, I had 1945 and 1946 in mind, and you will recall I changed that a few questions beyond. Now would you state what the result was as against 1945 and 1946?

A. What result are you asking me to state?

Q. Whether there has been an increase in per capita consumption since, say, 1945?

A. No, there has not.

Q. And you recall, do you not, that within a few questions after I asked you about 1948, I corrected that error and asked you about 1945 and 1946?

A. No, I do not recall that. I have read the thing rather carefully.

Q. Do you know what page that was at?

A. No.

[3588] Q. I will get it for you.

Examiner HYDE: Look it up at the recess time, Mr. Winton, and you can come back to it. Let's go on.

Mr. WINTON: All right.

By Mr. WINTON:

Q. And the basis for your picking 1948, just to get it clear, was that you thought that the North Jersey supply and fluid requirements were then in balance, was it not?

A. As stated here in my statement, I was trying to assess the fact that to keep within the meaning to the Secretary's statement, a New Jersey market should take responsibility for a surplus in the short season, for any seasonal surplus, at those same plants, among those same producers——

* * * * *

[3593] Q. Isn't it also true that about 50 percent of the supply for the North Jersey pool will have to come from out of New Jersey plants?

A. From out of New Jersey plants or from plants outside New Jersey?

Q. That is what I meant.

A. Plants outside New Jersey?

Q. That is right.

A. Yes, and I would think some of those would be in Orange County.

Q. Now, as a matter of fact, have you any idea where the bulk of that milk would come from? Looking at Exhibit 59 for identification, it would seem that a good deal [3594] of that milk might come from the central areas of the milkshed. Exhibit 59 is this map, which I think you are quite familiar with.

A. I would like to look at it again.

(Document handed to witness)

The WITNESS: For whatever it is worth, I would think that the milk for the North Jersey market coming from outside the State of New Jersey would come from south central New York, northeastern Pennsylvania, the area around Orange County, New York, and probably some from south central Pennsylvania.

By Mr. WINTON:

Q. Bearing in mind that would be about 50 percent of the supply, would it not,——

A. Yes.

Q. —how are you in a position to state that the seasonal production pattern in that area, which is a necessary part of the New Jersey pool supply, would vary substantially from the Order 27 seasonal production pattern?

A. I have not attempted to state exactly how the production would vary seasonally. I have merely made the statement that it would be less extreme, and the production of

milk in those areas does vary, or [sic] an average, less extremely than a good many parts of the New York milkshed which go to make up the average of the New York [3595] milkshed.

Q. Do you mean that it is probably less than the North country seasonal variation?

A. Yes.

Q. But it would be on a par with the seasonal variation in the central area on Exhibit 59, where the New Jersey and Order 27 plants are intermingled, would it not?

A. It might be partially, but at some of the unregulated plants it is quite possible that the seasonal variation is less than in a New York plant in the same area.

Q. Don't you think your statement rather assumed that the producers located in New Jersey were the North Jersey pool, and that you should compare them with the average of the Order 27 producers? Isn't that roughly what you have done in reason number two on page six of this statement?

Mr. Daniels: Mr. Winton, did you mean, when you said Northern New Jersey producers, those located in Northern New Jersey or those shipping into Northern New Jersey?

Mr. Winton: I meant those located in Northern New Jersey.

The Witness: I do not understand your question. [3596] I would either like to have it read or have you rephrase it.

Mr. Winton: I think it would be best to have it read.

Examiner Hyde: We will have it read.

(The Reporter read from his notes as requested.)

The Witness: Now I will have to say I don't understand your question.

By Mr. Winton:

Q. Perhaps I can put it this way: Haven't you in substance made a comparison between the producers located in New Jersey and the producers taken as a whole for the whole Order 27 area? Isn't that what the comparison is

under paragraph sub-two on page six of Exhibit 29? Isn't that what you did?

A. No, that is not what I did. You are asking me if I was comparing the producers located in North Jersey with the seasonal variation in production outside?

Q. Let me do it step by step.

A. That is better.

Q. For the seasonal variation which you took for the North Jersey pool, you really took the variation amongst producers located in North Jersey, didn't you?

A. The data that I have in here is the seasonal variation of producers in North Jersey, and at 35 plants [3597] located outside New Jersey that were shipping 60 percent or more of their receipts to the New Jersey market.

Q. You didn't have data on the seasonality of production there, did you?

A. May receipts at the 35 plants outside New Jersey exceeded August receipts by 59 percent.

Q. I see that. Now, those are the figures you used in saying that there is considerable difference? Would you put those figures in the record, then, on those 35 plants?

A. The extreme variation is already in the record.

Q. The extreme variation?

A. From May to August.

Q. It would seem to me that that would indicate that you did compare production inside New Jersey with production outside New Jersey. That is at page four, under seasonal surplus.

A. You can make that comparison from those figures.

Q. Isn't that what you did to arrive at the conclusion on page six in paragraph two?

A. Well, I took an unweighted average of these two percentages for in New Jersey and the 35 plants outside New Jersey and arrived at a figure of 45. That was based on the fact that somewhat more than 50 percent or approximately 50 percent of the total volume of milk comes from [3598] outside the state. Now, using that figure, and my knowledge of seasonal variation in the different areas of the New York

milkshed, I made the statement which you have been asking me about.

Q. And you lay particular emphasis there on the seasonality in the outer reaches of the milkshed, which I take it is largely the North Country, isn't that what you do right in that paragraph 2 on page six?

A. Well, there are some other sections of the New York milkshed other than what is called the North Country that have fairly wide seasonal variation in production. The west country in New York and some plants in Pennsylvania.

Q. Which are those you describe as the outer reaches of the milkshed in your statement?

A. The whole group of them, the outer reaches.

Q. In New York, which area would it be?

A. It would include the North Country as the outer reaches of New York, and the Cattaraugus and Allegany County in the western area, Warren County in Pennsylvania, that is all outer reaches.

Q. And Crawford, I take it?

Examiner HYDE: What state is that in?

Mr. WINTON: Pennsylvania.

The WITNESS: There is one plant located in Crawford County.

[3599] By Mr. WINTON:

Q. You include that, too?

A. Well, it is certainly in the outer reaches.

Q. That is all I wanted to know, what you mean by it.

* * * * *

[3629] Q. In view of the fact that the hypothetical Jersey pool plant would have a higher price, wouldn't he be able [3630] to attract the efficient, large, low cost producers in a particular area?

A. The plant with the higher price——

Q. Right.

A. —in almost any area would be able to attract the larger producers.

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[3631] A. If the pricing of milk sold in North Jersey is regulated by an order, and the pricing of milk sold in New York City is regulated by an order, and these plants wanted to sell milk in either one of those two areas, then they are going to be regulated and would need to be in one of the two pools.

Q. It goes further than that, doesn't it? These plants would have to pay a price competitive with the [3632] blends under the two orders, wouldn't they, to get a supply of milk, if they are in the same general milkshed area?

A. I would think they would have to pay somewhere near the competitive price.

Q. And if all the fluid markets are pretty much in one order or the other, as they are proposed to be included in the present hearing, then the only other market not under regulation would be manufacturing, wouldn't it?

A. That is correct.

Q. And that couldn't possibly return to producers a price equivalent to the blend under one or the other of the orders, that is, the North Jersey Order or the New York Order, could it?

A. Not likely.

Q. Then wouldn't these plants be under pressure to survive to get into one or the other of the marketing areas, to ship milk into them?

A. They do now, do they not?

Q. But they would be under pressure. They couldn't survive unless they did ship enough milk into one or the other to qualify as a pool plant, could they?

A. I wouldn't think they would even try. I think they would get in. They are shipping milk into the marketing area now.

Q. Then wouldn't this increase the number of plants

[3633] trying to qualify as pool plants in either or both orders?

A. It would increase the number of plants that would be trying to qualify as pool plants. It would also increase the number of pools under which they might qualify.

Q. There are only two pools they could qualify for?

A. Right now there is only one.

Q. But there would be two?

A. There would be two.

Q. And they would be required to ship, under your proposal, 60 percent in the short period into the North Jersey pool to qualify for that, would they not?

A. The pool plant requirements are stated in this proposal as 60 percent, yes.

Q. And there would be some tightening up of the Order 27 requirements, too, under the proposals of your group. They appear on page 8 of the hearing notice.

A. Yes, I believe so.

[3634] Q. Plants which don't presently ship the required percentage of milk into the market would be under pressure to ship the required percentage of milk into one or the other markets so they would qualify, wouldn't they?

A. That is correct.

Q. On the other hand, there would be no new or additional fluid market opened up by these orders, but it would still remain the existing fluid markets, wouldn't they?

A. That is correct.

Q. Wouldn't that have the effect of intensifying the competition for getting into these two city markets, that is, the North Jersey marketing area and the Order 27 marketing area?

A. Yes, it would tend to create some competition.

Q. And might that not tend to demoralize the price prevailing in these fluid markets?

A. Not necessarily.

Q. Well, it could have that effect, could it not?

A. Well, there are pool plants in the Philadelphia market that all have this compulsion to try to sell Class I milk. I

don't know that the price is demoralized down there. I don't think it necessarily leads to a demoralized Class I price, because somebody is trying to sell some Class I milk.

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[3678] Q. The small dealer receiving milk under the North Jersey order would have a relatively small amount of surplus which would be costly for him to handler, wouldn't he?

[3679] A. Relative to a dealer that had a large quantity of surplus, yes.

Q. You know there are a considerable number of such small dealers in North Jersey, don't you?

A. Yes.

Q. Wouldn't those dealers be forced to reduce their receipts from producers to where their receipts in the flush season matched their fluid requirements, so as to avoid this loss on handling surplus?

A. No, I don't think so. There are a great many markets in the United States under Federal regulation, in which there are these small quantities of surplus and these small dealers. It is a characteristic of a fluid market.

Q. Isn't it a fact that even today, without this additional incentive to do that, the small dealers in areas like New Jersey, have tried to do what I told you, match their flush receipts to their fluid requirements? Isn't that a fact even today?

A. Well, they have attempted to match their receipts with their fluid requirements in a number of different ways, which is one of the advantages of uniform production, and one of the advantages of having a base-surplus plan to encourage uniform production, so that you can match receipts with sales.

[3680] Q. In point of fact, didn't you testify in Elmira, in 1953, that the situation under Order 27, and it exists substantially the same today, was such as to lead dealers supplying the North Jersey market to match their flush receipts

against their fluid requirements? Didn't you testify to that, and have figures to that effect?

A. I don't know, but I still think the statement that I just made covers it. In any competitive situation in a fluid market, this is not an unusual circumstance of a dealer attempting to match his receipts with his sales.

Q. And the effect of a North Jersey Order which you recommend would be to give an additional incentive to a dealer to keep his receipts in his flush period even with his fluid requirements, wouldn't it?

A. There are a number of things in the proposed order that would encourage the dealer to keep his receipts at all times of the year in line with his sales, so as to minimize the amount of surplus that must be regulated by the order and must be in the order.

Q. I was asking whether the incentive wouldn't be to keep your receipts during the flush season matched with your fluid requirements.

A. That would be part of his effort to match receipts with sales.

* * * * *

[3687] Q. I am quite near the end, so be of good cheer.

Assume that this pool which would be set up under the recommendations of the Governor's Committee had a Class I utilization of approximately 80 percent in August. Now let us assume, as I think you will also agree is the fact, that the total supply at plants approved for North Jersey is much larger than the amount which would be in that pool. Is that not correct?

Mr. DANIELS: I would like to have that read, please.

Examiner HYDE: Will you read it, Mr. Reporter, please.

(The reporter read from his notes as requested.)

The WITNESS: This is all the plants that are approved for the North Jersey market?

Mr. WINTON: That is correct.

The WITNESS: Yes, I think the supply would be larger than that represented by the pool.

[3688] By Mr. WINTON:

Q. And that supply would also be much larger than the fluid requirements of the North Jersey market?

A. Yes. I think we have been over that a good many times. There is much more milk approved than is needed for fluid use.

Q. You stated that any plant that wanted to serve the North Jersey market could qualify under the pool, did you not?

A. I don't know that I did. What I should have stated is that any plant would have as much opportunity as any other plant to qualify.

Q. If any or all of these plants wanted to qualify, there would be quite a scramble for sales in to the marketing area under the North Jersey Order, wouldn't there?

A. Well, are we still making the assumption that there is only an 80 percent—that the utilization is 80 percent?

Q. That is right.

A. You couldn't have them all in.

Q. Even if the utilization were less than 80 percent, there would still be some that couldn't get in, wouldn't there?

A. Well, I don't know what the utilization would be [3689] if they were all in.

Q. Do you think that all the plants presently approved for North Jersey could possibly qualify under the pool as proposed by the Governor's Committee?

A. I don't know, but I rather doubt it.

Q. Now, then, if those plants that would be frozen out wanted to get in, they would have an incentive to sell at whatever price they could get to dealers who had outlets in North Jersey, wouldn't they, so that they could qualify for the North Jersey pool?

A. Within decided limitations, I would think.

Q. What are the limitations?

A. Do you mean they would give milk away in order to qualify?

Q. They would be under an incentive to do it if that was the——

A. They are not under any incentive to give milk away in order to qualify, I don't believe.

Q. Each one would figure he would have to give it away only for a little while, in order to get in, and he would find his competitors had to give it away for a little longer time. Hasn't that been the experience, often, in similar situations?

A. I don't believe so.

Q. Don't you think that there would be a competitive [3690] effort by different plants to force their milk into the market so they would qualify?

A. I think there would be some competition for fluid sales in the market, yes.

Q. And that might tend to demoralize the prices in the fluid market in the marketing area, might it not?

A. I don't believe it would demoralize the fluid market.

Q. Let me call your attention to this situation: Suppose a very large cooperative, like the Schoharie County Cooperative, which is dual approved—you know that, don't you?

A. Yes.

Q. —wanted to qualify for New Jersey. It could even sell at a loss and return less than the New Jersey blend in order to return more than the New York blend, if there were a substantial difference between the two, couldn't it?

A. Are you thinking of sales, street sales, or sales to some other handler?

Q. Well, let's take it by steps. In the first place, the cooperative is not under any obligation to return any particular amount to its members, is it?

A. The order doesn't require it to return a particular price.

* * * * *

[3700] Q. On page five of your statement, you say, about ten lines from the bottom, "Although the proposed order for North Jersey accepts the Order 27 Class I price, an order which will promote an adjustment of production to sales and therefore a high class I utilization rather than a high Class I price is concerned a desirable objective." Is it correct to infer from that that since a high Class I utilization is capable of stimulation by [3701] a lower Class I price, that the proposed order for North Jersey should have lower Class I price prescribed in it than Order No. 27 presently has?

Mr. LENT: Mr. Hyde, I think I have to object to that question. He has made an absolute assumption of the response of consumption to price which is no evidence in this hearing record. If he wants to make that a theoretical assumption, it is all right with me.

Examiner HYDE: What do you say, Mr. Polikoff?

Mr. POLIKOFF: I admit that I made an assumption.

Examiner HYDE: He says if you want to make it a theoretical assumption, he will withdraw his objection. Do you agree to that?

Mr. POLIKOFF: I didn't read it, but the witness just got through saying that the accumulation of surplus in a market or in an area is in part the result of the relationship between the blend price and the cost of producing milk, and that the blend price is regulated primarily by the Class I price. So I think my assumption is a very fair result of the preceding comment on page five, which I didn't feel it necessary to read out loud in framing my question.

Mr. LENT: Let it go. I have made my statement in the record.

Examiner HYDE: You may answer.

[3702] Mr. WILLIAMS: May I make this comment, that Mr. Polikoff is inaccurate in quoting Dr. Pierce. The sentence is "The blend price in the market until surplus develops is regulated primarily by the Class I price."

Mr. POLIKOFF: I didn't put my statement into quotation

marks at that moment, and if Mr. Williams thinks that that paraphrases what I said more accurately, that suits me.

Examiner HYDE: Do you know what the question is, Dr. Pierce?

The WITNESS: I think so, as well as I ever did. It is our feeling that a more healthful and healthy market exists if you can get a large part of the milk utilized as Class I, and get the favorable blend to producers out of high utilization rather than attempting to get it out of a high Class I price, which doesn't seem to be too successful a method.

* * * * *

[3703] Q. Doctor, we have been talking from time to time about plants not being under the order which you propose, even though they may have a history of shipping to the market. Tell us, Doctor, where will that milk go?

A. I haven't been talking about such plants that I know of. What do you mean?

Q. I thought you were talking about such plants. I guess the most clear illustration of it that I can give you is the Meyersdale plant you were talking about yesterday. You assumed that that milk would no longer come into this market, or indicated that it wouldn't. I think you agreed with Mr. Winton a little while ago that other plants were in a similar position. My question to you is if such plants do not or cannot qualify under the New Jersey order, as you indicated that they wouldn't or couldn't, my question to you is where will that milk go?

A. The New Jersey market would, under regulation, continue to have approximately the same volume of Class I sales as they have now, it would have a supply of milk [3704] associated with that Class I market, and there would be lots of other milk in the United States that wouldn't be in the North Jersey market. I don't know where that milk would go. It would go as it does now at other places. The market would not take less milk because it was regulated.

Q. You said just now that that milk will go as it does now to other places, but you forget that our assumption is that a

substantial part of the milk from those plants does come into New Jersey now.

A. The New Jersey market would continue to take milk for fluid use. It would not necessarily be the same milk. It might be. It may come from the same plants. If those plants do not choose to become associated with the North Jersey pool, it would be because they want to go someplace else, it would be because they find a market someplace else.

Q. Dr. Pierce, I don't mean to take you back over your previous cross-examination. But I think it is quite clear from your earlier testimony that it is not just a matter of choice that you have set up a scheme of requirements for plants to fulfill which a plant of that kind you have yourself predicted would not be able to fulfill.

A. Would not be in as good a position to fulfill as some other plant.

[3705] Q. That is right. Now I will return to my original question. Where will that milk go?

Mr. Williams: He has answered that question, Mr. Hyde.

Examiner Hyde: He said he didn't know where it would go.

Mr. Williams: He has generally answered the question.

Examiner Hyde: I think that was his answer, but Mr. Polikoff may want him to repeat it or enlarge upon it, if he can. I will take it.

The Witness: I have implied that there would be shifting of supplies. If a plant is now manufacturing all its milk should be in a position to qualify as a New Jersey pool plant, then some other plant that might now be shipping part of its milk into New Jersey maybe will put some milk into manufacturing.

By Mr. Polikoff:

Q. Suppose it is a plant which does not have manufacturing facilities?

A. Then they will probably try to stay in the North Jersey pool, or find some other outlet.

Q. You don't know what other outlet they would find?

A. The Meyersdale plant might ship into Pittsburgh. [3706] They might ship milk south. They might divert milk to some manufacturing plant. I don't know.

Q. Doctor, what would happen in a situation like this, which is a very real situation, and I know it is very real because I happen to be the attorney for the Meyersdale plant. There is a plant which is approved for parts of Maryland, which are proposed to be placed under a Federal Order for the Washington, D.C., market, as well as being approved for part or all, I don't know, of the market which is proposed to be placed under this order. Let us assume, which is awfully close to the fact but I am not sure enough to put it on any basis other than an assumption, let us assume that it has been sending 50 percent of its receipts to the Washington market, and 50 percent of its receipts to the New Jersey market. Then let us assume that in each Federal order there is a proposal such as we have here in each proposed Federal order, let us assume that there is a proposal that this plant must ship 60 percent of its receipts to the market to be under the order.

Now, since the plant can't very well dispose of 120 percent of its milk, what would a plant in that position have to do?

A. I don't know that I can answer a question that started almost a week ago and had 15 different assumptions in it, and questions, and so forth, of that nature, and [3707] assuming we have a Federal order for the Washington market. I just don't think I will even try, unless you can break it down.

Q. On the basis of some of your previous answers to some of my previous questions, you would expect a plant like that to either find a market for additional milk in New Jersey or withdraw from the market and, therefore, attempt to find a greater outlet for its milk in the Washington, D.C., market, wouldn't you?

A. I would think it might naturally do one of those.

Q. Would that be a good thing for the Washington, D.C. market, do you think?

A. I am sure I don't know.

Q. It could create disorderly conditions in the Washington, D.C. market, couldn't it?

A. Why, it might, I suppose. I don't know that it would.

Q. And in the event of other plants which could not qualify under the proposal for the New Jersey order, which must change their historic pattern of disposing of substantial quantities of milk in this market by finding outlets elsewhere, those plants, too, could be compelled to change their business in such way as to tend to create disorderly marketing in other outlets that [3708] they seek, isn't that true?

A. I don't know why it would necessarily create disorderly marketing in other areas. Certainly, the North Jersey market will continue to have just as much Class I business as they have had in the past. It will make a market for milk. It may not be exactly the same plants that have been shipping small quantities into the North Jersey market, particularly if they happen to be quantities that are surplus to some other area they are supplying and they just dump small quantities in here. The market shouldn't be expected to take care of that.

Q. Do you call 50 percent of producer receipts or 40 percent of producer receipts a small quantity being dumped in this market?

A. Not when they are shipping that quantity of milk, no.

Q. But the 60 percent requirement would, nevertheless,——

A. Well, as a matter of fact, under the assumptions you made about the Meyersdale plant, I believe it could qualify as a north Jersey pool plant. The figure is 60 percent of the total receipts and 50 percent have to be sold within the marketing area. That is in the short period of the year. So the Meyersdale plant would qualify under that basis.

Mr. POLIKOFF: Could I have the last statement [3709] read back, please.

Examiner HYDE: Mr. Reporter, would you read the last answer, please.

(The reporter read from his notes as requested.)

By Mr. POLIKOFF:

Q. Doctor, do you have the proposal in front of you, on page three?

A. Yes.

Q. It was my understanding that during August, September, October, and November, 60 percent of the total receipts from producers must be supplied as Class I sales in the marketing area, provided, however, that such percentage of total producer receipts as Class I sales in the marketing area shall be 50 percent or more in each of these months. Doesn't that mean that you must not only have at least 50 percent in any one month, but also have 60 percent as a total for all four months? So you would still have to average 60 percent for all four months.

A. You are correct as this appears here. I did not testify as to pool plant requirements. It is my impression that the person who did testify to the pool plant requirements suggested a modification of this. I suggest you save that question and ask Dr. Young when he is on the stand.

Q. Very well. Doctor, in any event the proposal is [3710] certainly designed to change channels of distribution as they exist now and have existed for many years in this market, isn't that true?

A. I would think it would change channels of distribution or relationships and sources of milk only if those channels have been built up and based on a lack of regulation, a pricing of milk inside New Jersey by an agency that could not price milk from outside the state. There is nothing in the proposals that would discriminate against any plant or handler if he is in an economic position to supply milk to the North Jersey market. And the market would continue to take as much milk as it has before.

Q. Is this another way to put it: That if New Jersey has

maintained an uneconomically artificial high Class I price for a generation, and as a result has given a natural, if not necessary, incentive to a large percentage of the milk industry to bring in lower priced milk from other states, that the purpose of this proposal is to change the natural and necessary course of marketing which has taken place during the last generation under those facts?

A. No.

Mr. Dolan: I object.

Examiner Hyde: The answer is in. He said no.

Mr. Dolan: I wanted to make an objection on the [3711] ground that it is a characterization of the order, whereas in fact the order does not prohibit any person from shipping milk into New Jersey whether or not they are a New Jersey pool plant. Those that historically have shipped less than the 60 percent can still continue to ship the milk into New Jersey.

Examiner Hyde: We will let your observation stay there and hope that that will relieve the objection that you had or wanted to make before we got the no answer.

By Mr. Polikoff:

Q. When you say no, Doctor, do you mean no in your opinion?

A. No, I think your statement, for instance, said that New Jersey had maintained a very high, super high, I think you had six adjectives with it, Class I price. I don't believe that is the situation. The order will regulate the pricing of milk both inside and outside the State of New Jersey in such a way as to create orderly marketing. There is no question but what it has been disorderly in the past several years, not because of any particularly high Class I price in New Jersey but because of the inability of the Office of Milk Industry to regulate the price of milk produced both outside and inside the state.

Q. Regardless of its cause, and I really didn't think I could get you to agree with me, Doctor, which [3712]

doesn't necessarily mean that either one of us in wrong, Doctor,——

A. I was going to say that I have agreed with you in the past when you have been right.

Q. I wish some other people could say the same thing.

Getting back to the question, Doctor, in any event regardless of what may have caused the marketing situation which has developed in the last many years, it is the purpose of your proposal to change that system of marketing which has thus developed, isn't that so?

A. The purpose of the proposal is to regulate the pricing and handling of milk for the North Jersey market, which has not been done in the past in a uniform manner.

Mr. Polikoff: That is all I have at this time.

. . . . .

[3727] Q. I don't believe that appears on the legend of the exhibit.

Now, would you accept my statement that the only plants that are not closely associated with neighboring plants within these 15 mile circles would be the plants at Meyersdale, Pennsylvania, at Port Allegany, Pennsylvania, and at Greencastle, Pennsylvania? Do you find other circles on Exhibit 59 that have only one plant in the circle?

A. Centerville.

Q. In the case of Centerville, the plant located at Spring Creek, the radius of those two plants are intermingled, aren't they?

A. That would make 30 miles.

Q. Or less than 30?

A. Well, it would make it more than 15.

Q. Are you aware of the plants in Maryland and Delaware that have New Jersey health approval and are not under Order 61?

A. Am I aware that there are plants in Maryland and——

Q. Delaware.

A. —Delaware that are approved for North Jersey?

Q. That are approved for New Jersey.

[3728] Mr. WILLIAMS: Mr. Hyde, shouldn't he rephrase the question to mean North Jersey and not New Jersey, to be accurate to this proceeding?

Examiner HYDE: Can you do that, Dr. Brown?

Dr. BROWN: I will do that, yes.

Let me rephrase the question.

By Dr. BROWN:

Q. Would the plants located at Emmitsburg, Westminster, Rising Sun, Millington, and Centerville, in Maryland, constitute all of the plants not under Order 61 that have North New Jersey health approval?

A. I don't know.

Q. Would the plant at Dover, Delaware, constitute the only plant in Delaware that is not under Order 61 with New Jersey health approval?

A. I don't know.

Q. If those are all of the plants in those two states that have health approval for North New Jersey and are not under Order 61, would it appear to you that there is a high degree of intermingling of supply for these two markets that we are discussing here?

A. Well, I would say that in certain areas there is a considerable amount of intermingling.

Q. If you consider all of the plants that have North New Jersey health approval and the fact that the [3729] plants named in Maryland and Delaware and the three or four plants in Pennsylvania that are not within this 15 mile radius represents all that are not intermingled, couldn't we agree that there is a high degree of intermingling?

A. Well, there are other plants in Pennsylvania that are not within the 15 mile radius, too, I think. There are a couple of plants in Allentown, for instance.

Q. The plants at Allentown, aren't they within a radius that is tied in with North Hampton and the plants across the river in New Jersey?

A. They are not within 15 miles of any Order 27 plant.

Q. A section for the production area for the Allentown plant is within the 15 mile radius of the plant at Broadway, New Jersey, isn't it?

A. I wouldn't be surprised.

Examiner HYDE: Dr. Brown, when you reach the right place, we would like to recess for lunch.

Dr. BROWN: This is the right place.

Examiner HYDE: We will now recess for lunch and resume in this room in one hour and 30 minutes.

(Whereupon, at 12:05 p.m., the hearing was recessed, to reconvene at 1:35 p.m., the same day.)

[3730] AFTERNOON SESSION

1:35 p.m.

Examiner HYDE: The hearing is in order.

Whereupon, C. W. PIERCE, resumed the stand as a witness, and, having been previously duly sworn, was examined and testified further as follows:

Examiner HYDE: Dr. Brown, you may continue with your cross-examination.

CROSS-EXAMINATION (Resumed)

By Dr. BROWN:

Q. Dr. Pierce, this morning when we recessed for lunch, we were discussing the first principle of the Secretary as stated in Exhibit 11, for identification, and that principle has to do with the considerable degree of common source of supply. We had looked at Exhibit 59, for identification, and you had pointed out, I believe, four plants that you thought were not in a common source of supply. Regardless of whether this common source of supply represents 70, 80 or 90 percent or some other percent of the supply for North Jersey and New York Order 27, do you believe this principle has application to the problem of promulgating an order in North Jersey at this time?

A. The map which has been marked as Exhibit 59, of [3731] course, shows plants that are approved for shipments of milk to North Jersey. It does not indicate whether or not these plants actually shipped milk. So that it may not be entirely representative of actual sources of supply as much as it is representative of possible sources of supply. Nevertheless, I would not hesitate at all in agreeing with the Secretary's statement which I take to be a fact rather than a principle, that there is to a considerable degree a common source of supply.

* * * * *

[3888] EXAMINATION—Resumed

By Mr. MOORE:

Q. Dr. Pierce, do supplies for your proposed North Jersey order fall within the Boston milkshed, the New York milkshed, or the Philadelphia milkshed?

A. They could not be considered at all to fall within the Boston milkshed. The area which I would call the supply area for North Jersey is in close proximity or intermingled with some parts of the New York milkshed, and in close proximity or intermingled with some part of the Philadelphia milkshed.

Q. What plants that would serve the proposed North Jersey order would fall outside the New York milkshed? Or, how many, approximately?

[3889] A. Well, the areas which might well have supplies available for the North Jersey market or become a part of the North Jersey market would include some sections of southeastern and central Pennsylvania, from which the New York market draws milk and the Philadelphia market draws milk, and then you skip some hard coal region going north into northern Pennsylvania and along that northern tier, southern edge of the New York milkshed. There would be, I expect, plants supplying the North Jersey market.

* * * * *

[4546] Q. I will get on to another point. Wasn't it also true that the philosophy which you testified to then of your groups, and you subscribe to it personally, was that some way had to be found to limit the amount of milk in a market pool?

A. That is right.

Q. And did you not also—and I call your attention—before I do that——

A. By limit the amount, I would like to add to that to include in the pool milk that served the fluid needs of [4547] that market.

Q. Then that makes it necessary—I was going to skip this—for me to read a statement to you, from the record page 2245, the Newark proceeding, which you made. "Unless some way is found to limit the amount of milk in a market pool, certainly no one can contend that the new order would return any better blend to the producers in nearby areas under Order 27. Order 27 includes producers up along the St. Lawrence river. I just feel it is lucky the St. Lawrence is there and the Canadian border because I cannot imagine where the licensing would have continued to." Did you make that statement?

A. I did.

Q. And does that statement in any way refer to the need or the desirability of the milk for fluid use, or, rather, to the location of the producer?

A. When I said limit to the milk, I said limit the milk to that needed to supply the fluid market.

Q. Nevertheless, you did refer to the need of limiting the milk in order to aid the nearby producer, did you not? Perhaps you would like to look at that.

A. That is the inference you have made from my statement.

(Document handed to witness.)

The Witness: That is quite right. I think, as [4548] I have said before, the nearby producers under Order 27 have had their milk gravely underpriced for a long time, and we

certainly in New Jersey did not want to find ourselves in any similar position.

Q. What was the inference to be drawn, and I won't draw it, from your statement then that the order, and that was Order 27, included producers up along the St. Lawrence River, and you felt it was lucky that the St. Lawrence was there and the Canadian border. Tell me the inference that you think was to be drawn from that.

A. Well, I think everybody is probably at liberty to draw their own, and they have and will. I have told you what I meant by what I said, that I felt the market should be limited to, that the pool should be limited to, milk that has some relation to the fluid needs of the market.

• • • • •

[5365] Q. You know, don't you, that under any order proposed for North Jersey, a substantial amount of milk would come from plants located in states other than New Jersey?

A. Yes.

• • • • •

[5438] By Mr. DANIELS:

Q. Dr. Young, before lunch, I was trying to determine how you formulated your opinion as to the present Order 27 plants that you believed would, in the event of an order being promulgated for Northern New Jersey, became Northern New Jersey pool plants. You stated that you got some information from OMI concerning a list that you furnished OMI. Keep in mind I am only talking about Order 27 plants, plants presently operating under Order 27, no matter in what state. Do you know how large a list of Order 27 plants you submitted to OMI?

A. To the best of my knowledge and belief, it would be approximately the number shown on this list of plants included in Exhibit 87. That would be——

Q. You mean the list of plants included in Exhibit 28, not 87.

[5439] A. No, Exhibit 87. That is, this list right here (indicating).

Examiner HYDE: That list is not Exhibit 87.

By Mr. DANIELS:

Q. Exhibit 87 shows only dots.

A. That is right.

Q. And you translated those blue dots into names of plants listed on Tables 24, 25, and 26 of Exhibit 28?

A. That is right. So the total number would be 24.

Q. Sir?

A. The total number would be 24.

Q. 24 from the State of New York and 11 from the State of Pennsylvania, wasn't it?

A. No. 17 from the State of New York and 7 from the State of Pennsylvania on this piece of paper here (indicating).

Q. That is a total of how many New York order plants that you believed would convert? 24?

A. That is right. Seven from Pennsylvania and 17 from New York.

Q. Just let me check.

All right, 24. Now, Doctor, why would you happened to have selected those 24 and asked for information concerning them? Or did you ask for information concerning [5440] a larger list of plants?

A. No, the list we took over was 61 on it, and that 61 list is the list that I named for you this morning, and the origin of the 61 came about in the following manner: Mr. York took up with Mr. Lawrence the question of attempting to get at how much milk there might be in a Northern New Jersey pool. That was in the very early part of the history of this procedure. Mr. Lawrence suggested that I go to Syracuse and work with Mr. York to see what we could come up with. We went over the list of plants from the

Waller report, which is Exhibit 28, and, on the basis of the information we had, whether it was good or had it was the best we could do, we concluded that the list of plants which I named to you this forenoon were likely prospects to become Northern New Jersey order plants.

Then Mr. York made the request to me that I work with the girl who made up the map—Lewis is the only name I know—and arrive at what we thought might be a reasonable approximation of the size of the pool and the amount of Class I milk that would be sold in such a pool.

Q. All right.

A. And we did that. And then——

Q. Now, Doctor,——

A. We felt that we needed more information and more definite information. Therefore, I took this list of 61 [5441] plants over to OMI and asked them, going over the list as carefully as I could, if they would pick out the plants that in the fall of 1955, August to November, had shipped 60 percent or more of their receipts from producers to New Jersey, and to give me the total amount of milk received from producers at those plants. There were 35, in the letter I received from OMI containing the production by months. It was stated that there were 35 of these plants.

Unfortunately, I can't give you the exact list of the plants that are in that 35. The only thing I can state for certain is that they are all included, the entire 35 are all included, in the list that I read you this morning.

Q. So that some of those 35 are presently Order 27 plants and some are not?

A. That is right.

Q. What about the other plants that you have named, the 25 or 26?

A. That had to be a matter of judgment, good in some places; poor in others.

Q. Could OMI give you any information concerning them? Or did they?

A. Well, I think in some offhand conversation they said that most of them had shipped 25 percent or more, but

[5442] that some of them had not shipped any, and the list of those that had not shipped any I have.

Q. You what?

A. The list of plants that did not ship any milk in August, September, October, and November, according to the records of OMI, I have.

Q. Now, Doctor, of the 35 plants that shipped 60 percent or more of their producer receipts into the Northern New Jersey area to be sold as Class I, they then, of course, had 40 percent or less surplus during those four months?

A. Yes.

* * * * *

[5449] Q. The letter you got from Mr. Schomp does not disclose the receipts of any of the individual 35 handlers?

A. That is correct, it does not.

Q. Then how did you conclude that each one of those handlers sold 60 percent of their milk in Northern New Jersey from August through November of 1955?

A. Because I specifically asked for that information. That is, I specifically asked Mr. Schomp to give me the total production of the plants which did, from August to November, ship 60 percent or more of their receipts from producers to New Jersey, and I have the utmost confidence that that is exactly what I got.

Q. Or sold in North Jersey as Class I?

A. That is right, in the proposed marketing area.

Q. All I am asking, Doctor, is whether you got that information verbally, or whether, in addressing that question to Mr. Schomp verbally, his answer was disclosed [5450] to you by way of a letter.

A. Which you have seen.

Q. Just by way of a letter?

A. Yes.

Q. And that letter merely gave you the aggregate number of pounds received by 35 handlers for each month?

A. 35 that individually shipped 60 percent or more.

Q. All right. And you have the aggregate amount of milk that those 35 received from producers?

A. That is right.

Q. And you assumed that Mr. Schomp followed your request, and aside from that you know nothing?

A. Yes.

Q. Yes what?

A. I did assume, that Mr. Schomp was going to give me what I asked for. He always has and I am sure he did this time.

Q. All right.

A. Or else he tells me I can't have it at all.

* * * * *

[5453] Q. Now, we come back to the 35 plants. A moment ago I inadvertently said 24. You cannot name the 35 plants concerning the 60 percent proposition, and the information you received from Mr. Schomp, can you?

A. I can't name them, no. I do not have the list.

Q. Now as to the other 26 plants you made an assumption that they shipped 60 percent of their producer receipts into New Jersey August through November 1955, or did you assume that they performed some other function [5454] which served the market?

A. No.

Q. No what?

A. We did not assume that they shipped 60 percent.

Q. All right.

A. Our assumption was that under a New Jersey order as proposed, that the plants that we named would ship 60 percent through some re-alignment of shipments or something of that nature.

Q. Now, then, if all the plants, all the 61 plants, ship 60 percent of their producer receipts into Northern New Jersey as you have recommended it to be outlined in a Federal order, will you give me the total amount of milk that you anticipate those 61 plants will ship into Northern New Jersey?

Mr. POLIKOFF: Can I have the question read, please?

Mr. DANIELS: And that is August through November.

Examiner HYDE: Would you read the question?

(The reporter read from his notes as requested.)

The WITNESS: The only way that I could do that would be in the same manner that we computed the production or receipts from producers at 50 out of state plants, and the method of computing that was to take the 35 plants whose receipts we knew, and to add to it the [5455] average receipts per plant of the 35, multiplied by 15. As a matter of actual fact, we used an even 20 million pounds per plant, and we added 300 million to the 688 million of the 35 plants and got the 988 million shown in Table 1 of Exhibit 38.

Now, if all 61 of these plants qualified, the only way I would know how to adjust the 988 would be to multiply 20 million times 11 or add 220 million more to the 988, which would make 12.8 million.

I know of no other way. That is, I do not have any information upon which I could arrive at an approximation of the production at 61 plants other than in that manner.

By Mr. DANIELS:

Q. The 35 that you know about are the 35 that Mr. Schomp furnished you information concerning?

A. Yes, and may I just——

Q. And then——

A. May I, Mr. Daniels, correct an apparent misstatement that I made in the record? That is that it was my understanding that OMI got this by a survey of the plants. I was informed in the recess by Mr. Schomp that they obtained this information from the New York State Department of Agriculture and Markets and from the Pennsylvania Milk Control Commission. I would like to correct that misstatement.

[5456] Mr. WINTON: Would you inquire whether that is published data of OMI?

By Mr. DANIELS:

Q. Do you know whether it is published data?

A. To the best of my knowledge, it has not yet been published.

Q. All right. So that for the other 25 plants, then, you assume that they handled, on an average, 20 million pounds a year?

A. That is right.

Mr. KRAUSE: Did you say the other 25?

Mr. DANIELS: Yes.

By Mr. DANIELS:

Q. The other 26?

A. 26.

Q. You assume that they handle 20 million pounds what?

A. Each plant.

Q. In what period of time?

A. One year's time, 1955.

Q. Do you have any real basis for that assumption?

A. Yes, I do. If you will go over a sizeable number of plants, divide the total production by the number of plants, you will arrive at about 20 million per plant as the average size of plant in the area where these plants [5457] are located. That is about what there is, per plant.

Q. Did you go into the Allentown area and try to find out what Bechtel Moyer, or Moyer Bechtel handles, a year?

A. No.

Q. How about Walter Bupp, down at Bupp's Dairy at Hanover?

A. We did not go to any of these plants to get the volumes.

Q. Then what would make you assume that those 26 plants would handle as much or only 20 million pounds a year?

A. The 35 plants handled 688. You divide by 35 and you get 20, approximately. Do you want me to look at a lot of other plants, where there is a bunch of them together and divide by the number and get you 20 million?

Q. No, Doctor.

A. That is the way it is done, and that is the way the answer will come out.

Q. I only want the facts.

A. That is the fact.

* * * * *

[5468] Q. Well, all right, then we will ask it this way, Doctor: What percentage is the associated surplus, percentage [5469] of their total receipts is the associated surplus, in April, May and June?

A. I find that a little difficult. I approached it from the standpoint of the year round average.

Q. I know. But that is all right for an economist and for pencil and paper. But now we are operating a plant. What do you think the associated surplus is in April, May and June? It represents, I mean, what percentage of the producers production who ships to any one plant?

A. To answer that question, to my own satisfaction, I would have to refer to the statistical reports from the Philadelphia market, and also refer to some finding of the Secretary that that market was carrying the surplus associated with the fluid sales, or sufficient to take care of its fluid sales. I would be willing to rest on what that average is for April, May and June.

Q. Doctor, this term has been used so much, associated with surplus, to take care of the Class I needs and the associated surplus. It is nice terminology. But as an economist, with your wide experience, and long experience, I would like for you to tell me what percentage of the total producers production you believe associated surplus is in any given period of time. Then we will try to break it down. What is it for a year?

A. Assuming the seasonality of production that prevails [5470] at the plants that we believe would be Northern New Jersey Order plants, a percentage, yearly average percentage, of 70 percent Class I and 30 percent Class II is liberal

and in excess of the allowance of associated surplus in most of the Federal Orders in this country.

Mr. WIXTON: Mr. Presiding Officer, I move to strike the part of the answer which says that the amount is in excess of that allowed in most of the Federal orders in this country as not at all relevant.

Mr. POLIKOFF: I second the motion.

Mr. DANIELS: I am not going to second or third it. I join in the motion. You got it out faster than I could.

Examiner HYDE: The motion is granted.

Mr. DANIELS: Just that last part.

Examiner HYDE: I don't want to have to go into all the other orders.

By Mr. DANIELS:

Q. Now, Doctor, if you believe that the associated surplus for Northern New Jersey should be 30 percent of the producers production which is shipped to handlers, you surely can't come to that conclusion without having included the extreme limits of the associated surplus expressed in percentage.

A. In associated surplus, the 30 percent carries a lot of [5471] leeway over any likely demands for fluid milk out of the total supply.

Q. That is obvious, is it?

A. It is to me.

Q. Then give me the percentage, if it is so obvious. I can't figure it out. What is it in April, May and June? What percentage of the total production would be associated surplus?

A. In Table 1 of Exhibit 38——

Q. Exhibit 28?

A. 38.

Q. Table 1?

A. In the hypothetical production and sales for a northern New Jersey market, or in a northern New Jersey order, the percentage of Class I shown in that table, to even figure,

is 63 in April, 58 in May, 62 in June, with an average of 70 for the year.

Q. In your Table 1 of Exhibit 38, you have assumed that the percentage of production which would be represented by associated surplus would range from 42.5 percent to 15.7 percent in August, is that right?

A. That is correct.

Q. Sir?

A. Yes.

Q. That is purely an assumption on your part, and that [5472] is assuming, is it not, that the 26 dealers that you had no information on had a production of 20 million pounds a year as an average, and that they shipped, August through November, 60 percent of their milk into New Jersey, isn't that so?

A. Yes.

Q. Yes. Now——

A. The 20 million being approximately the average plant yield in 396 plants under Order 27.

Q. Now, of course, I am coming back to this one, I am coming back to my question, Doctor, I haven't left it, but I just want to slip in here a little bit. Bechtels, of Easton, will never ship 60 percent of their milk into Northern New Jersey, will they, if they ever ship any?

A. You know that plant better than I. If you say that is likely to be true, I would go along with it.

Q. If I were up on the witness stand, I wouldn't even have them on the list. But I am asking you. You have no reason to believe, first, that they handle——

A. 20 million pounds?

Q. Or two million.

A. From what little I know of it I would be almost certain that they probably didn't handle ten.

Q. And Easton Sanitary Milk Company?

A. I don't know how much they handle.

Q. And Bupp's, of Hanover?

[5473] A. We did not have the amount handled in any of these plants. Can we shorten it in that way?

Q. Yes, that shortens it. Now we will go back. What would you do with this 42.5 percent of associated surplus in May?

Mr. POLIKOFF: Mr. Presiding Officer, before Dr. Young answers that question, can I try to straighten out something about the 26 plants that he referred to a moment ago? His table here has the caption in column two "Computed Production at 50 out of State plants".

Examiner HYDE: Why don't you save that until we give the witness to you, Mr. Polikoff.

Mr. DANIELS: I would be glad, if there is confusion about where I get the 26, to say I am subtracting the 25 from the 61.

Mr. POLIKOFF: I know where you got your 26. When you ask Dr. Young whether that 26 was included in column two, he answered yes. Yet if that is so——

Mr. DANIELS: I didn't ask him that. It is not in column two, Table 1.

Mr. WINTON: I think we can clarify this by one or two questions.

Mr. DANIELS: I think it is clear.

Examiner HYDE: You gentlemen will have the witness in your regular order.

[5474] Proceed, Colonel.

By Mr. DANIELS:

Q. Now, Dr. Young, my question is what do the provisions of your order as recommended do, or anticipate will be done, with the 42.5 percent which you term associated surplus in May of any year?

A. The first question seemed to indicate what would I do with it.

Q. I changed it. Your recommendations would anticipate that what would be done with it?

A. If I were a handler, I would put in some manufacturing equipment and make some money out of it.

Q. If you were principally a fluid milk handler?

A. That is right.

Q. Now, then, does your recommended proposal anticipate that that is what a handler would have to do?

A. That he would have to manufacture his surplus?

Q. Yes.

A. Yes.

Q. And does that anticipate that all fluid milk handlers would have to put in manufacturing facilities?

A. Not necessarily.

Q. But there would have to be manufacturing facilities available for that milk?

A. Yes.

[5475] Q. Sir?

A. Yes.

Q. What would you do with those manufacturing facilities in August?

A. In August?

Q. Yes. When there is only 15.7 percent as associated surplus.

A. Wash them up and close them down.

Q. Close them down. Does your order anticipate that that is what a handler should do?

A. Our order anticipates a price for that kind of milk that would make that a proper and feasible operation to be conducted with reasonable prospects of profit.

Q. You know, Doctor, I haven't the least idea what you said, and I am awful sorry, because you are talking above me. How does that answer my question? Does your order recommend or anticipate that these manufacturing facilities would have to be washed up and closed down during the month of August?

A. If there is no surplus there to manufacture.

Q. Is there enough surplus there at 15 percent to run manufacturing facilities?

A. It would appear to me that there evidently would be in some plants, on an off and on basis.

Q. And now are you recommending, and do the provisions [5476] of your order recommend, a Class II and a Class III price low enough to take care of this on and off operation?

A. It is my considered judgment and opinion that it does.

Q. How does your Class III price and Class II price, or Class II price, as you recommend it compare with the price for the same product under Order 27, under the Pennsylvania Milk Control Commission orders, or with the prices paid for midwest manufacturing product?

A. The Class II price under our order is designed to be the same as the Class III price under Order 27, for, presumably, the first year of operation.

Q. And the plants under Order 27, so far as restrictions in the order are concerned, can operate the year round, can't they?

A. I believe many of them do.

* * * * *

[5480] Q. Those are the 61 that you said were likely to qualify for Northern New Jersey. You named those plants. I didn't.

A. If I were going to revise this table and revise that, I would probably want also to revise the column of production in New Jersey, on the assumption that not all of the plants in Northern New Jersey would be order plants.

Q. In your table of 50 as originally prepared, you assumed all the plants physically located in Northern New Jersey would be northern New Jersey plants?

A. Well, not necessarily that, Colonel, but that was the definite piece of information that we had, and if all of them did, perhaps 50 plants outside the State might be the number that would become order plants and be able to qualify regularly under our proposed order.

Q. I don't need it for the purpose of my question. Would you tell me at what point you think the figure of 988,377,000 pounds would go by the addition of these other plants?

A. Of the 11?

Q. Of the 11 plants.

A. 208 million.

Q. That, then, would be 1,200,000,000 pounds, roughly, [5481] using rough figures?

A. Yes.

Q. That being so, that is the milk that would come from 61 plants, in your opinion?

A. Yes, and under our——

Q. As near as you can estimate?

A. Yes, under our assumptions.

Q. There is milk coming from more than 61 plants now, isn't there?

A. To the best of our knowledge and belief in relatively small quantities, and I mean by relatively small quantities that the Order 27 plants, 40 in New York State and 17 in Pennsylvania, in 1952, shipped about 22 percent of their receipts from producers to New Jersey, taken as a whole.

Q. That would then increase this 1,200,000,000 to about what figure?

A. You mean by that all of the plants approved?

Q. No, the ones that shipped milk in, and the amount of milk they shipped in. You just said 57 of them shipped in——

A. About 22 percent.

Q. —22 percent of their production.

A. In 1953.

[5482] Q. And about how much milk do you think that was?

A. We have that. Why don't we get it right?

Well, the 17 Order plants, Order 27 plants, in Pennsylvania approved for shipment to New Jersey in 1953 received a total of 354 million.

Q. So 22 percent of that would be roughly 75 million pounds, just roughly?

A. Well, the actual shipments out of that were 62 million.

Q. What is the production of the 50 out-of-state plants during August, September, October and November?

A. I think it is 195. Isn't it, approximately?

Q. Well, it is around that, probably.

The remaining Class I sales are very roughly 60 percent of that out-of-state production; isn't that so?

A. I guess it is a little nearer 300. That would be about 58 percent.

Q. Did that have anything to do with your 60 percent [5490] recommendation?

A. No.

Q. Didn't you know that before now?

A. No.

Q. It is a coincidence?

A. A coincidence.

Examiner HYDE: He said he didn't know it.

Mr. DANIELS: All right.

By Mr. DANIELS:

Q. Now, Doctor, if the Secretary should see fit at the close of all this testimony to name pool plants, then you believe that there should be some shipping requirements for any plants that would want to subsequently come into the pool?

A. Yes, we do.

Q. Don't you think, Doctor, that your 60 percent shipping requirements for August through November with no less than 50 percent in any one of those months is a little stringent?

A. No. I don't think so. It is a little lax, I think.

Q. And that is on the basis that there would be proper consideration given to naming the plants to manufacture the associated surplus, of course?

A. Yes.

Q. Looking at Exhibit 87, for identification—before [5491] I ask you something specifically about it, let me ask you this: Were you in the room when Dr. Black testified?

A. No. I was in Philadelphia.

Q. Well, Doctor, looking at Exhibit 87, for identification,

and remembering where the line crosses, as recommended in the proposals, the State of New Jersey, is there any part of that territory that you would say traditionally and historically would make up the natural milkshed for Northern New Jersey?

A. The natural milkshed, did you say?

Q. Yes, I don't know whether you do or not. I am just asking.

A. Well, I think the plants that have shipped milk to New Jersey, with the farms that supply those plants with milk, constitute a New Jersey, a Northern New Jersey, milkshed that could be called a natural milkshed.

Q. And with the exception of two or three plants, you find what you would normally expect, do you not, that the New Jersey milkshed, as you have anticipated it to be in the event there is an order, by the distribution of your blue dots, shows that the milkshed is a much more restricted one in area than New York, of course?

A. Yes. There are comparatively few plants that have approval for the sale or distribution of milk in New Jersey that are more distant than 200 miles, or 220 miles, in that [5492] vicinity.

Q. And that you would expect as a natural course of events because of the smaller population?

A. I think that is a natural area from whence milk would naturally come under natural conditions, just as it does in Philadelphia, where the most distant plant is 210 miles.

Q. Now, the fact that New York also draws milk from the Northern New Jersey milkshed, and from the Philadelphia milkshed, does that in any way indicate to you that they ought to be under the same order?

A. No, sir.

Q. You are subscribing to the theory that any named pool plant or any subsequently designated pool plant, because of subscribing to certain shipping requirements, should all hold a New Jersey State health permit, shouldn't they, for Class I milk?

Mr. POLIKOFF: Can Dr. Young's previous statement be read?

Examiner HYDE: The answer to the previous question?

Mr. POLIKOFF: Yes.

Examiner HYDE: The Reporter will read the answer of Dr. Young, please.

(The Reporter read from his notes as requested.)

Examiner HYDE: All right, Colonel.

By Mr. DANIELS:

Q. I am trying not to delay it, Doctor. If you can, roughly tell me what the others were. I am not interested in the specific figures for my next question, except some estimation.

A. The figure that I have here from the 40——

Q. From what?

[5483] A. 40 Order 27 plants in New York state, in 1953, shipped to New Jersey 147 million, which was 21 percent, and that would mean something in the vicinity of 700 million more.

Q. So, Doctor, that would bring the figure of milk coming into Northern New Jersey up to around two billion pounds?

A. I have not added it up. You have; I haven't. It seems to me that it is more than that from the 17 plants. We had 1200 and then we added a total production of about 353, and about 700 million more. It seems to me we would get up to about 2,050,000,000. 2,250,000,000.

Q. I think that is right. I will take that.

Doesn't your proposals aim at limiting the milk that is now actually coming in the Northern New Jersey territory? I am not talking about milk approved to come in. I am talking about milk coming in.

A. No.

[5488] Q. Doctor, there are some figures here that strike me as a little unusual. If you will turn to table one of Exhibit 38, for identification, the first column represents the

production of producers resident in New Jersey, doesn't it?

A. In the main. I think there are a few producers included there that live outside the state and bring their milk across the line.

Q. But in the main they are resident New Jersey producers?

A. That is right.

Q. If you take the months of August, September, October and November, and add that production, or add those production figures, and then take the Class I sales for Northern New Jersey for August, September, October and November, add those figures and get a total, and then subtract those two totals, you will have some Class I sales remaining, will you not?

You can see that from just looking at it.

A. The total of the sales for those four months is approximately 425 million.

Q. All right. What is the production for those four months by New Jersey residents?

A. I am doing this very loosely.

[5489] Q. That is all right.

A. 258.

Q. What is the difference between the—What did you say?

A. 425.

Q. And 328?

A. 258.

Q. And it is——

Examiner HYDE: What is that 258?

Mr. DANIELS: 258 million pounds produced by New Jersey resident farmers during the months of August, September, October and November, and the figure is approximate.

The WITNESS: Yes.

By Mr. DANIELS:

Q. We have about 167 million?

A. Left, that is right. Of sales.

A. That is right.

Q. You recommend that no plant should be a pool plant if it is subject to another federal order. Subject to another federal order when? What I am trying to get at is this, Doctor: Suppose that a plant is now subject to Order 27 or Order 61, and would start, for one reason or another, to ship milk into Northern New Jersey.

Do I interpret your recommendation to mean that it could not become a pool plant under Northern New Jersey?
[5493] A. Yes. I believe that it is impossible for a plant to comply with two different orders at the same time.

Mr. Dolan: May I have the last question and answer read, please?

Examiner Hyde: Mr. Reporter, will you please read the last question and answer?

(The Reporter read from his notes as requested.)

The Witness: Well, it could become a pool plant under Northern New Jersey by relinquishing its pool status under the other order. I didn't quite understand your question.

By Mr. Daniels:

Q. But you are not recommending, or you wouldn't recommend, that it would be in a period of hiatus, would you?

If it applied for a pool status in Northern New Jersey, in order to be under the authority of that order it would then have to give up its pool status in the other order?

A. Yes. When it becomes a Northern New Jersey pool plant, it would then have to give up its status as a pool plant under the other order. I think that is common in all federal orders.

In that connection, you realize, Mr. Daniels, that a plant which was not under another federal order or had relinquished its position under another federal order, under [5494] the provisions that are now in this proposal, that that plant could become a Northern New Jersey Federal

order plant by shipping 65 percent or more of its receipts from producers on a month to month basis.

Q. Turning to page two of your prepared statement, identified as Exhibit 38, and dropping down to about a third of the way on the page, I see a paragraph that starts out "At this time we should like to call attention". Will you read that?

Then you talk about ten bottling and processing plants outside the marketing area, and suggest that the problems be solved by changing the wording in Section 990.9(3). Tell me what you have in mind, will you?

A. Yes. The Governor's Committee and those associated therewith, have given that problem some attention. What we had in mind was this, that these ten plants—six of them I named and I noted the others as we went over them—sell milk in the New Jersey marketing area, and particularly in South Jersey they also sell milk, in such a way that the 60 percent qualification would, particularly in the case of Decker's Dairy, make it impossible for it ever to qualify as a pool plant. And since the producers get the benefit of all the Class I sales that he makes, it seems to me a singularly unjust treatment to Decker's Dairy and the producers of Decker's Dairy to not credit all of those Class I [5495] sales to his qualification requirements.

There was objection raised to that general idea on the grounds that that would throw the gate open to some plant out in Lebanon, for instance, or York, Pennsylvania, that was primarily a distribution plant for those markets, by shipping small quantities, and, due to their Class I sales in York or Lebanon, become order plants. That was the objection to crediting all of the Class I sales that a plant might have to the qualification requirements.

Q. Are you talking about bottling plants——

A. Yes.

Q. —and processing plants that ship bottled milk into the area or sell bottled milk into the area?

A. Yes, that are engaged in distribution into the area.

Q. Decker may very well be in this situation, that 80

percent of his milk is sold as Class I, 40 percent of it being sold in Northern New Jersey, and 40 percent sold in Southern New Jersey, and the way the proposals are written he would not be a pool plant but would have to pay compensatory payments, would he not?

A. Yes.

Examiner HYDE: Would the reporter please read the question and the answer?

(The Reporter read from his notes as requested.)

[5496] Mr. WINTON: He didn't refer to the proposals in the statement, but, rather, the proposals in the hearing notice?

Mr. DANIELS: My reference was to the proposals in the hearing notice.

The WITNESS: That is as I understood it.

By Mr. DANIELS:

Q. Conover and others may be in the same position?

A. Well, there could be others in the same position.

Q. You are recommending that the Secretary write a provision which would, in that instance, or instances similar to that, have all of his Class I bottle sales credited to the 60 percent, whether they were sold in Southern New Jersey or Northern New Jersey, is that what you are recommending?

Mr. DOLAN: I object. That is at the bottom of the page.

Mr. DANIELS: Do you object to the bottom of the page?

Mr. DOLAN: I object and call your attention to the bottom of the page.

Examiner HYDE: The bottom of the page of what?

Mr. DOLAN: Page two of his statement.

Mr. WINTON: Which exhibit?

Mr. DOLAN: Exhibit 38; and running over to page three.

[5497] By Mr. DANIELS:

Q. All right, with the limitation that not more than 25 percent of it shall not be sold outside the marketing area,

with that limitation. Is that what you are recommending?

A. That was the recommendation. I might comment here that, under the naming of the plant provision, it seems to me that that would be taken care of without any special provisions.

Q. Then in the example we just used, there would be 65 percent credited to Class I sales?

A. Yes. That problem is handled in some other orders by providing that the total production have subtracted from it the sales made outside the marketing area.

Q. And then the remaining production worked against the sales made within the area?

A. Yes.

* * * * *

[5501] Q. Then that being so, shouldn't this percentage requirement of shipping be lowered a little below the 60 for the plants who subsequently want to come in?

A. I don't think so, Colonel. That answer is based on a considerable experience in the plants that supplied a market with milk.

Q. So the fluid market calls on these plants for 40 percent of their production, August through November. What would be the status of those plants that would ship 40 percent of their production?

A. They are not order plants.

Q. Not order plants. Then they would have to pay compensatory payments?

A. The buyer would have to pay compensatory payments.

Q. And that is the difference between Class II and Class I?

A. Yes.

Q. The milk would not come to him, then, at the same cost as his competitor?

A. You never get that with emergency milk.

Q. And you would consider that emergency milk?

A. Yes.

Q. Don't you think you should have a provision to take care of that?

[5502] A. Of course, we have a provision to take care of it if he ships 65 percent.

Q. But there is not that much needed. There is 40 percent or 50 percent needed.

A. I think we are getting awfully hypothetical, almost to the degree of fantasy.

Q. It is a situation and some thought should be given to it?

A. Yes.

* * * * *

[5717] Q. Before you proceed to the remaining four, did you have any additional information you wanted to give us with respect to any of these six?

A. No. The other four are Easton Sanitary Milk Company at Easton, Pennsylvania, and my understanding is that they sell milk in Warren County, New Jersey, and in Easton, Pennsylvania.

Q. By that you mean bottled milk, bottled at Easton?

A. Yes.

Q. Is that a substantial operation?

A. Yes. Then Sunerest Farms, and Mowrer, Inc., at Butztown.

Q. Where is Butztown?

A. Pennsylvania.

Mr. DANIELS: That is right near Easton, isn't it?

The WITNESS: Yes.

By Mr. KRAUSE:

Q. How about that operation? Where does that sell, as well as in Pennsylvania?

A. That sells in Warren County, New Jersey.

Q. And in Pennsylvania?

[5718] A. And in Pennsylvania.

By Mr. DANIELS:

Q. And is a substantial operation?

A. And is a substantial operation. The other two that I had in mind were located in the marketing area but close to the border. The two plants are Johanna Farms, located in Flemington, and Johanna Farms sells milk within the marketing area, is a substantial distributor of milk in Trenton, and other parts of Mercer County, and is a substantial distributor of milk either directly or through two subsidiaries in Morrisville, Pennsylvania, and souther, lower Bucks County, Pennsylvania.

The other one is Bush Dairy. Those two are on a list I have of plants that are located in the Northern New Jersey marketing area. Bush Dairy at Flemington, Bush Dairy distributes milk widely over the marketing area and also is a substantial distributor of milk in Mercer County, outside the area, and particularly in Trenton, New Jersey, and also across the river in lower Bucks County, Pennsylvania.

That constitutes the detail.

* * * * *

[8055] Mr. WILES: Mr. Hearing Master, I would like to call Dr. Brown.

Whereupon, DORRIS D. BROWN, was called as a witness, and, having been first duly sworn, was examined and testified as follows:

Mr. WILES: Mr. Hearing Master, before I qualify Dr. Brown, his written statement with many pages of accompanying tables I have given you in six copies, and I would like the entire document marked for identification, if you would.

Examiner HYDE: A document bearing the caption "Statement of Dorris D. Brown, Economist; Chester W. Smith, Associate Economist, Mutual Federation of Independent Cooperatives, Inc., New York-New Jersey hearings, Albany,

New York, October 1956", is marked Exhibit No. 136, for identification.

(Exhibit No. 136 was marked for identification.)

Mr. WILES: I would like the record to show that [8056] this is a statement, and the accompanying tabular materials, which is a joint effort of Dr. Dorris D. Brown, Economist for Mutual Federation of Independent Cooperatives, and Chester W. Smith, Associate Economist. But at this time I would like to belay the qualification of Chester W. Smith until he testifies later in this hearing in New Jersey, as a matter of expedition.

Examiner HYDE: Very well.

DIRECT EXAMINATION

By Mr. WILES:

Q. Dr. Brown, you are the economist for Mutual Federation of Independent Cooperatives?

A. Yes.

Q. Have you testified before in this instant hearing?

A. Not in this particular hearing, no.

Q. For the record, then, I wonder if you would state your association with the Federation and your technical and economic background.

A. I have been employed by the Mutual Federation of Independent Cooperatives, Syracuse, New York, since February 1, 1955, in the capacity of economist, and in that capacity have participated in all of the Order 27 hearings that have been held since then, and in part of the hearings of the Office of Milk Industry in New Jersey, and in part of the hearings on Order 61, whose milkshed is highly intermingled [8057] with Order 27 and the New Jersey markets here in this region.

Previous to February 1955, I might point out that my college training includes a B.S. Degree in Agriculture, with a major in dairy production and manufacturing at the University of Missouri; a Masters Degree at the University

of Missouri in the field of Agricultural Education; and a Masters and Doctors Degree at Harvard University in the field of Public Administration. I have had experience working as a county agent in Missouri in two counties, both of which were high dairy counties in the St. Louis milk market, having had some experience in that market, and also as extension economist at the University of Missouri with responsibilities for certain parts of our milk marketing program.

I have had experience at the North Carolina State College of Agriculture, at Raleigh, North Carolina, in the capacity of extension farm management and milk marketing specialist, and also teaching both subjects in the college. At that institution, I represented the college with the State Milk Control Commission in their program that they carried on during the time I was there.

Q. I would like to ask you. Dr. Brown, if you also did not work and testify with regard to a petition for proposed state order No. 134 for a defined Syracuse market.

[8058] A. Yes.

Q. I wonder if you would state for the record also what the nature of the organization is for which you are testifying.

A. Mutual Federation is a Federation of Independent Cooperatives in the milkshed, Order 27 milkshed, some of whom are operating cooperatives, others are bargaining type cooperatives. Among those groups there are five cooperatives whose milk supply in part is distributed in the marketing area under consideration for extension to Order 27. Those cooperatives would include the Shawangunk Cooperative Dairies, Inc., in the Mid-Hudson Valley, the Crowley Milk Producers Association here at Binghamton and at Newburgh, in the Mid-Hudson Valley, Tomkins County Milk Producers Cooperative, Inc., at Ithaca; the Syracuse Dairy Farmers Cooperative at Syracuse; and the Order 27 producers of the New York Guernsey Breeders Cooperative at Syracuse.

* * * * *

[8706] EDMUND E. VIAL, was called as a witness and, after being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. WINTON:

Q. Will you give your name and address to the reporter, please?

A. My name is Edmund E. Vial. I reside at 6 Ridgeway Circle, White Plains, New York.

Q. Dr. Vial, you testified at other Order 27 hearings, did you not?

A. I did.

Q. And you are having prepared and it is presently being mimeographed, a statement of your qualifications?

A. That is correct.

Mr. WINTON: Mr. Presiding Officer, as soon as that is ready, I would like to offer that and shorten the testimony as to Dr. Vial's qualifications.

• • • • •

[10,139] Q. Later on, on page two, you discuss the situation which exists when milk from nearby Northern New Jersey plants is shipped into New York, and you say that subsection (d) allows a handler to dispose of this milk which you call surplus milk into New York for disposition as Class I milk, with the Class I benefits accruing to Order 27 producers. You state "The milk is New Jersey surplus and would be carried by New Jersey producers." How about the reverse situation? Suppose Order 27 milk comes into the New Jersey marketing area. Is that Order 27 milk New York surplus and should it then be priced at Class III under the New York Order with the compensatory payment going to the New Jersey producers?

Examiner HYDE: Dr. Brown?

Dr. Brown: I believe Mr. Winton meant going into the New Jersey marketing area. He said the New York marketing area.

Examiner Hyde: Let's have it read, please.

(The reporter read from his notes as requested.)

The Witness: Yes, I believe it would work that way.

[10,140] By Mr. Winton:

Q. The net effect would be that New York producers would be losing a traditional Class I market which they serve now at a I-C price, isn't that true?

A. That would depend upon the number of plants that they would have that would be supplying the New Jersey market that would be under the New York pool.

Q. How would that last consideration affect the problem? Whatever plants there are under the New York order could no longer serve North Jersey except to return a Class II price to the New York producers instead of the Class I-C price, isn't that right?

Mr. Krause: I think Mr. Winton misspoke himself. He said Class II price.

Mr. Winton: Well, it is Class III under the New York Order.

By Mr. Winton:

Q. Is that right?

A. To the extent of the milk that would be sold in the New Jersey marketing area, that is correct.

Q. In the proviso under subparagraph (d) of Section 990.31, it is a condition to a Class II classification under the New Jersey Order, that compensatory payment "has been made as prescribed in Order 27." But under Order 27, a compensatory payment would be due only if the class price [10,141] under the New York Order and under Order 90 were different, isn't that correct? Will you look at Section

927.78(1)? It is page 35 of the Market Administrator's pamphlet.

Mr. MURPHEY: Exhibit 86, I believe.

Mr. KRAUSE: Mr. Winton, I don't think your reference was complete.

Mr. WINTON: 927.78(b)(1).

The WITNESS: Can I have the question read back?

Examiner HYDE: Would you read the question, please, Mr. Reporter?

(The reporter read from his notes as requested.)

The WITNESS: I don't follow the question, Mr. Winton.

By Mr. WINTON:

Q. Perhaps it requires a little more elaboration.

The general rule under that paragraph (1) is that the compensatory payment, if the milk is classified and paid for under another order, is any plus amount obtained by subtracting the value of the milk at the class prices under the other order from the value computed under Order 27. There is a proviso I want to discuss with you. But putting the proviso aside, if the two class prices were identical, there would be no compensatory payment due?

[10,142] A. That is right.

Q. Then no compensatory payment would have been made, which is a condition for the operation of the proviso in subparagraph (d) of Section 990.31?

A. I still don't get the full import of your question. Could you revise it?

Q. It seems to me that you don't come under the proviso in subparagraph (d) of Section 990.31 as proposed by you unless compensatory payments have, in fact, been paid on the milk in question, and if compensatory payments are not due because the two class prices are the same, then you wouldn't fall within the proviso in this subparagraph (d).

Mr. KRAUSE: By the two class prices being the same, you mean the two Class I prices being the same?

Mr. WINTON: That is right.

By Mr. WINTON:

Q. If you don't know the answer offhand, perhaps you can just say that requires further consideration.

A. I have no further remark to make on that question.

Q. The reason you say that if the proviso we have been discussing, which gives the New Jersey pool a Class II price and the Order 27 a compensatory payment, the reason for that is that the milk in question, you say, is New Jersey surplus and would be carried by New Jersey producers. [10,143] Is that correct?

A. Yes.

Q. How about the surplus associated with that milk?

A. Such as what surplus are you referring to?

Q. Suppose in a given month, suppose in the month of November, New Jersey milk is shipped into the New York City market for Class I purposes. At that point, it supplants an equal amount of Order 27 milk which would have been used for Class I purposes, right?

A. Yes.

Q. The compensatory payment might compensate the Order 27 producers for that lose?

A. Yes.

Q. How about the losses on account of the surplus associated with that milk which the Order 27 producers have carried? Is there any way that is taken out of the Order 27 pool?

A. We believe that the Order 27 would have been adequately protected through the compensatory payment provision.

. . . . .

[10,202] Q. As the compensatory payments are proposed, if the New Jersey Class I price is higher than the New

York Class I-A price, then New York handlers could ship Order 27 milk into the New Jersey market and pay the differences between the New York price and the New Jersey price, which would cost them no more than if they were under the New Jersey order, and they could leave all the surplus in Order 27. Are you aware of that?

A. I am aware that that could, under some unusual conditions, occur. That is not the intention of the proposals that we are supporting. We don't think that the alignment would get so far apart that it would create a situation that would activate this type of a movement.

Q. Even if the two prices were exactly the same, the situation would still obtain, would it not? A New York pool operator could ship Class I milk into New Jersey without any extra cost to him, and could leave the surplus in Order 27?

A. And vice versa.

Q. I don't know whether it would work vice versa, because [10,203] you have these rigid shipping requirements to stay in the New Jersey pool.

A. That question would have to be handled in terms of the complete revisions of Order No. 27.

Q. Even if the two prices were exactly the same that situ- Order 27 being burdened with the Order 90 surplus, then, have you?

A. Yes. I think that the provisions that we are suggesting for Order 27 would help prohibit loading the New York Order with surplus from New Jersey.

Q. If it were made tough for an operator to stay in the Order 90 pool, he might put his plant under the Order 27 pool and supply the North Jersey market and keep his surplus in the Order 27 pool?

A. And if it were made tough for him to keep his plant under the New York pool, then that would make a counteraction to keeping his plant in the New York pool.

* * * * *

[10,483] Q. In examining this record of shipments of New York State and Pennsylvania plants into northern New Jersey over the period of time you mentioned, didn't you discover that Northern New Jersey had drawn its fluid milk supply from a great many more than 60 plants during that period, out of state plants?

A. I never had any specific information as to what each plant did. I have had lists of the plants that were approved by the State Department of Health, but for which ones shipped or which ones didn't in 1953 the information was not available. I did compute the percentage of receipts that were shipped to New Jersey, and principally Northern New Jersey, at, I think it was, 17 unregulated plants. I could [10,484] check it, but there were a number of unregulated plants in New York, and 11 unregulated plants in Pennsylvania that seemed to be in a class by themselves in that most of the milk was shipped from those plants, and from nine other plants that had a substantial interest in other markets and from which a very much lower percentage of the receipts from producers was shipped to New Jersey. That above covers it. And also the Order 27 plants in Pennsylvania that were approved for New Jersey and shipped to New Jersey.

* * * * *

[10,706] Q. I am assuming it was sold for Class I use but it was surplus as far as New Jersey producers were concerned, that there was no call for that milk in the New Jersey market.

A. We can talk here until six o'clock, and we just are not ever going to agree that that is the way to do it, because that is a matter of such deep and basic conviction to the organization with which I am connected, that our intention is that it shall not ever touch even the hem of the garment of the Northern New Jersey order.

Mr. WIXTON: Mr. Presiding Officer, I have a few more

questions of this type, but I think they are going to provoke rather lengthy arguments as I go through them.

Examiner HYDE: I am going to try to stop the arguments. I will take the questions. Let's proceed.

[10,707] Mr. WINTON: I believe in view of the lateness of the hour——

Examiner HYDE: It is only 2:20.

Mr. WINTON: I have time, but I understand some of my conferrers here would be very much inconvenienced by a continuation.

Examiner HYDE: That is not my fault, Mr. Winton. Let's proceed.

By Mr. WINTON:

Q. While we are on the question of the justification for giving the New Jersey producers a Class II price for milk sold to the Order 27 marketing area for fluid use, let me ask this: If an Order 27 plant, as you know they do, ships milk into the New Jersey marketing area, under your proposed order, you know that that would be surplus under Order 27, as you interpret it?

A. I never interpreted it that way for New York.

Q. Would that be needed for fluid use in New York?

A. What is that?

Q. Would that milk be needed for fluid use in New York, generally, as things stand?

A. I don't think that bears on the problem at all, whether it would or would not be needed for fluid use in New York. But if it were sold to an order 90 plant for distribution out of a New Jersey handler's plant, it seems [10,708] to me that the reasonable presumption is that that is needed for the Class I market in New Jersey, and that the conditions and philosophy upon which we approach this are in reverse to what we feel should be done if milk goes from New Jersey into New York.

Q. Let's take a case that was discussed with you yesterday, whereby a distributor in New Jersey after looking at

the schedule of prices that you have for nearby milk decides it is not for him, and he goes and he brings in Order 27 milk, thereby displacing the market for the over-priced, and I don't mean that in any invidious sense, the higher priced North Jersey milk.

Under your proposals, would the North Jersey producers get anything because of that unfortunate state of affairs which your order would have brought about?

A. Let me refer you to Section 990.98, the first sentence. Do you have that?

Q. Yes.

A. "Class I sales from plants which are subject to another federal order shall be subject to payments into the North Jersey pool of the difference between the North Jersey Class I price and the other order Class I price if lower."

* * * * *

[11,715] The next document I have which I wish to offer is a two-page mimeographed document, and on the first page it has a table entitled, "Table 1, Number of Producers and Receipts and Utilization of Milk from Producers at Plants in the Allentown-Easton Section of Pennsylvania Which Ship Milk to Northern New Jersey, But Which Were Not New York Pool Plants, March 1955, June 1955, August 1955, November 1955, March [11,716] 1956 and June 1956."

Examiner HYDE: The document is marked Exhibit No. 165 for identification.

(Exhibit No. 165 was marked for identification.)

The WITNESS: This document has another table on page two which contains the same type of information but it is for plants which are outside of the Allentown-Easton section of Pennsylvania.

This is material which was obtained from records in the Pennsylvania Milk Control Commission, and it pertains to plants which I consider plants for northern New Jersey on

the basis of a discussion with Mr. Fogg of the Office of Milk Industry.

Mr. DANIELS: His name is Pfautz.

The WITNESS: No, this was Mr. Fogg.

Mr. DANIELS: Milk Industry? Pardon me.

The WITNESS: That was for the purpose of deciding which plants on a health approval list for New Jersey were supplying northern New Jersey and which ones were used to supply principally southern New Jersey.

Mr. DANIELS: This is not cross-examination, but so that I may get it right, you consulted with Mr. Fogg and then went to see Mr. Pfautz and you determined the plants on which you wanted information and got that information [11,717] from Mr. Pfautz of the Pennsylvania Milk Control Commission?

The WITNESS: That is right. I discussed with Mr. Fogg the plants for which I should seek data, and I obtained the data from the Pennsylvania Milk Control Commission for those plants.

I would like to say this with respect to this table: That there was one plant which supplied northern New Jersey with milk during a very small part of the year, and it was a small part of the total of that plant. I have not included it in this tabulation, since that plant was probably like some of the plants that would be considered plants for southern New Jersey which might incidentally ship a little milk into northern New Jersey.

I had no way of making a complete survey to find the source of all of New Jersey's milk. I might also say in connection with this that this material has been done rather recently, and there will be two or three more tables obtained from the same information.

The information I expect to have and will present it to the hearing as soon as I get another opportunity, and which I will distribute as soon as it is available. It consists of a table showing the differences in prices between the Pennsyl-

vania plants and New York minimum uniform price for a plant in the same mileage zones.

I also intend one other tabulation which would show [11,718] the receipts and utilization of milk by plants which have primarily a fluid milk business in some area other than northern New Jersey, but who do ship some milk into northern New Jersey, part or all of the year.

I would like to say with respect to Exhibit 165 that that material is in some respects comparable to Exhibit 163, Table No. 5, which deals with Pennsylvania plants.

Mr. DEMING: Mr. Hyde, was he referring to Table 1 or Table 2 of Exhibit 165 when he said it related to Table 5 of Exhibit 163?

The WITNESS: No, I mean the exhibit itself.

Mr. DEMING: The whole thing?

The WITNESS: Yes.

• • • • •

[11,719] The WITNESS: No, this was a hearing on Class I at Syracuse.

The next document I have is a one-page table entitled, "Premiums Paid by Handlers at New York Pool Plants Located in New Jersey by Specified Months in 1947, 1949, 1952, 1955 and 1956."

Examiner HYDE: The document is marked Exhibit No. 167 for identification.

(Exhibit No. 167 was marked for identification.)

The WITNESS: I might say with respect to Exhibit No. 167 that that was information requested by the Mutual Federation of Independent Cooperatives.

• • • • •

[11,846] Examiner HYDE: Dr. Pollard, you have some additional statistical material, and you may proceed.

PROMULGATION PROCEEDINGS

ANSON J. POLLARD

DIRECT TESTIMONY: (Resumed)

The WITNESS: I have two tables to complete the data I presented with respect to the State of Pennsylvania. The first one is entitled, "Number of Producers and Receipts and Utilization of Milk from Producers at Plants in Pennsylvania Outside of the Allentown-Easton Section Which Ship Milk to Northern New Jersey Which Have a Regular Fluid Milk Market Outside of Northern New Jersey But Which Were Not New York Pool Plants, March 1955, June 1955, August 1955, [11,847] November 1955, March 1956, June 1956."

Examiner HYDE: The document is marked Exhibit 169 for identification.

(Exhibit No. 169 was marked for identification.)

• • • • •

[12,060] Examiner HYDE: Have you any questions with respect to the admissibility of Exhibit No. 165?

Exhibit No. 165 is received in evidence.

(Exhibit No. 165 was received in evidence.)

• • • • •

Examiner HYDE: Have you any questions as to the admissibility of Exhibit No. 167?

Exhibit No. 167 is received in evidence.

(Exhibit No. 167 was received in evidence.)

• • • • •

[12,061] Examiner HYDE: Have you any questions as to the admissibility of Exhibit No. 169?

Exhibit No. 169 is received in evidence.

(Exhibit No. 169 was received in evidence.)

• • • • •

EXHIBIT 165

Table 1. Number of producers and receipts and utilization of milk from producers at plants in the Allentown-Easton section of Pennsylvania which shipped milk to Northern New Jersey but which were not New York pool plants, March 1955, June 1955, August 1955, November 1955, March 1956, and June 1956

| Year and month | Number of producers | Receipts from producers | Utilization | | |
|---|---|---|---|---|---|
| | | | Class I in Northern New Jersey | Other Class I | Balance |
| | | thousand pounds | | | |
| 1955 | | | | | |
| March | 1,183 | 18,284 | 2,346 | 9,521 | 6,417 |
| June | 1,171 | 18,185 | 2,532 | 9,422 | 6,231 |
| August | 1,179 | 16,469 | 1,610 | 11,631 | 3,228 |
| November | 1,187 | 15,710 | 2,766 | 9,537 | 3,407 |
| 1956 | | | | | |
| March | 1,174 | 19,512 | 2,423 | 10,463 | 6,626 |
| June | 1,183 | 19,432 | 2,052 | 10,305 | 7,075 |

Source:
Pennsylvania Milk Control Commission.

EXHIBIT 167

Premiums paid by handlers at New York pool plants located in New Jersey, by specified months in 1947, 1949, 1952, 1955, and 1956

| Year and month | Premiums paid | |
|---|---|---|
| | Average rate | Range |
| | dollars per hundredweight of receipts from producers | |
| 1947 | | |
| June | .615 | .400 - .805 |
| October | .202 | .155 - .290 |
| 1949 | | |
| March | .389 | .352 - .545 |
| April | .329 | .261 - .525 |
| May | .354 | .281 - .625 |
| June | .331 | .241 - .635 |
| July | .473 | .431 - .495 |
| August | .407 | .351 - .475 |
| 1952 | | |
| January | .148 | .000 - .212 |
| February | .150 | .000 - .175 |
| March | .299 | .035 - .362 |
| April | .437 | .370 - .483 |
| May | .496 | .325 - .593 |
| June | .555 | .500 - .595 |
| July | .432 | .400 - .500 |
| August | .345 | .322 - .505 |
| September | .210 | .075 - .500 |
| October | .293 | .095 - .495 |
| November | .273 | .195 - .495 |
| December | .323 | .000 - .935 |
| 1955 | | |
| January | .444 | .375 - .648 |
| February | .376 | .030 - .488 |
| March | .375 | .280 - .483 |
| April | .364 | .275 - .578 |
| May | .265 | .200 - .493 |
| June | .315 | .237 - .580 |
| July | .358 | .300 - .592 |
| August | .488 | .305 - .786 |
| September | .501 | .305 - .931 |
| October | .381 | .305 - .675 |
| November | .348 | .200 - .645 |
| December | .337 | .245 - .585 |
| 1956 | | |
| January | .346 | .275 - .642 |
| February | .356 | .285 - .680 |
| March | .347 | .286 - .662 |
| April | .281 | .215 - .597 |
| May | .284 | .230 - .564 |
| June | .450 | .305 - .836 |
| July | .415 | .305 - .719 |
| August | .370 | .285 - .545 |
| September | .322 | .247 - .544 |

EXHIBIT 169

Number of producers and receipts and utilization of milk from producers at plants in Pennsylvania outside of the Allentown-Easton section which shipped milk to Northern New Jersey, which have a regular fluid milk market outside of Northern New Jersey, but which were not New York pool plants, March 1955, June 1955, August 1955, November 1955, March 1956, and June 1956

| Year and month | Number of producers | Receipts from producers | Utilization | | |
|---|---|---|---|---|---|
| | | | Class I in Northern New Jersey | Other Class I | Balance |
| | | thousand pounds | | | |
| 1955 | | | | | |
| March | 363 | 4,746 | 2,035 | 2,590 | 121 |
| June | 373 | 5,073 | 2,304 | 2,409 | 360 |
| August | 374 | 4,621 | 1,832 | 2,716 | 73 |
| November | 376 | 4,316 | 1,333 | 2,983 | -- |
| 1956 | | | | | |
| March | 386 | 5,068 | 1,869 | 3,153 | 46 |
| June | 384 | 5,457 | 2,163 | 3,204 | 90 |

Source:
Pennsylvania Milk Control Commission.

4924

EXHIBIT 200

**MARKET ADMINISTRATOR**

**NEW YORK METROPOLITAN MILK MARKETING AREA**

205 EAST 42ND STREET NEW YORK 17 NEW YORK

ORegon 9-1100

FEDERAL ORDER NO 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO 124

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL
PURSUANT TO SECTION 927.46 (b)

February 1957

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.71 | $ .04 |
| I-B | 5.71 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.870 | .094 |
| III | 3.057 | .071 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 2.016 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .056 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .60653 |
| Average of Prices at midwestern condenseries | 3.229 |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34688 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots, bags or barrels" | .14000 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15150 |
| Roller Process | .13320 |
| Weighted average of Spray and Roller prices | .13869 |

March 5, 1957

C. J. Blanford
Market Administrator

4934

**MARKET ADMINISTRATOR**
**NEW YORK METROPOLITAN MILK MARKETING AREA**
205 East 42nd Street New York 17 New York
ORegon 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 125

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL
PURSUANT TO SECTION 927.46 (b)

January 1957

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.81 | $ .04 |
| I-B | 5.81 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.870 | .094 |
| III | 3.046 | .071 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 2.126 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .056 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .60426 |
| Average of Prices at midwestern condenseries | 3.254 |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34562 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots, bags or barrels" | .14000 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15330 |
| Roller Process | .13220 |
| Weighted average of Spray and Roller prices | .13853 |

February 5, 1957

C. J. Blanford
Market Administrator

1944

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MILK MARKETING AREA
205 EAST 42ND STREET NEW YORK 17 NEW YORK
ORegon 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 125

Addition to
Announcement of Minimum Class Prices
December 1956

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The quotations required for computing the following average were not received in time to be released by January 3, 1957.

Average of Prices at midwestern condenseries $3.265

C. J. Blanford
Market Administrator

January 7, 1957

4954

**MARKET ADMINISTRATOR**
**NEW YORK METROPOLITAN MILK MARKETING AREA**
205 East 42nd Street New York 17 New York
Office 9-1100

Federal Order No. 27, as Amended
New York State Revised Official Order No. 138

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL
PURSUANT TO SECTION 927.46 (b)

December 1956

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.87 | $ .04 |
| I-B | 5.87 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.892 | .094 |
| III | 3.092 | .071 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 2.168 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .054 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .61395 |
| Average of Prices at midwestern condenseries (Not Yet Available) | ----- |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34562 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots bags or barrels" | .14300 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15180 |
| Roller Process | .13360 |
| Weighted average of Spray and Roller prices | .13906 |

January 3, 1957

C. J. Blanford
Market Administrator

# 496A

**MARKET ADMINISTRATOR**
**NEW YORK METROPOLITAN MILK MARKETING AREA**
205 East 42nd Street New York 17 New York
ORegon 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 150

Addition to
Announcement of Minimum Class Prices
November 1956

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The quotations required for computing the following average were not received in time to be released by December 3, 1956.

Average of Prices at midwestern condenseries $3.256

A. J. Pollard
Acting Market Administrator

December 6, 1956

4971

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MILK MARKETING AREA
205 EAST 42ND STREET NEW YORK 17 NEW YORK
OREGON 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 188

**ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL**
PURSUANT TO SECTION 927.46 (b)

November 1956

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.81 | $ .04 |
| I-B | 5.81 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.908 | .094 |
| III | 3.197 | .074 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 2.084 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .054 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .63178 |
| Average of Prices at midwestern condenseries (Not Yet Available) | ----- |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34438 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots bags or barrels" | .14500 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15320 |
| Roller Process | .13290 |
| Weighted average of Spray and Roller prices | .13899 |

December 3, 1956

A. J. Pollard
Acting Market Administrator

# 498A

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MILK MARKETING AREA
205 East 42nd Street New York 17 New York
ORegon 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 128

Addition to
Announcement of Minimum Class Prices
October 1956

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The quotations required for computing the following average were not received in time to be released by November 2, 1956.

Average of Prices at midwestern condenseries $3.215

C. J. Blanford
Market Administrator

November 6, 1956

4994

MARKET ADMINISTRATOR
NEW YORK METROPOLITAN MILK MARKETING AREA
205 EAST 42ND STREET, NEW YORK 17, NEW YORK
ORegon 9-1100

FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 189

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL
PURSUANT TO SECTION 927.46 (b)

October 1956

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.51 | $ .04 |
| I-B | 5.51 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.827 | .094 |
| III | 3.142 | .075 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 1.844 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .056 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .62034 |
| Average of Prices at midwestern condenseries (Not Yet Available) | ----- |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34944 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots, bags or barrels" | .13426 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15260 |
| Roller Process | .13190 |
| Weighted average of Spray and Roller prices | .13811 |

November 2, 1956

C. J. Blanford
Market Administrator

# 500A


**MARKET ADMINISTRATOR**

**NEW YORK METROPOLITAN MILK MARKETING AREA**

205 EAST 42ND STREET, NEW YORK 17, NEW YORK

OREGON 9-1100


FEDERAL ORDER NO. 27, AS AMENDED
NEW YORK STATE REVISED OFFICIAL ORDER NO. 126

ANNOUNCEMENT OF MINIMUM CLASS PRICES AND BUTTERFAT DIFFERENTIAL
PURSUANT TO SECTION 927.46 (b)

September 1956

| Classes | Price per hundredweight 3.5%, 201-210 mile zone Section 927.40 | Butterfat Differential Section 927.41 |
|---|---|---|
| I-A | $ 5.37 | $ .04 |
| I-B | 5.37 | .04 |
| I-C | (Uniform Price Plus $.20) | .04 |
| II | 3.823 | .094 |
| III | 3.119 | .074 |

| | |
|---|---|
| BUTTER-CHEESE ADJUSTMENT SEC. 927.43 PER LBS. BUTTERFAT | .03 |
| FLUID SKIM DIFFERENTIAL SEC. 927.44 | 1.695 |
| UNIFORM PRICE BUTTERFAT DIFFERENTIAL ADJUSTMENT SEC. 927.67 | .056 |

| | |
|---|---|
| Simple average (midpoint) of daily wholesale selling prices 92-score butter in New York City | .61276 |
| Average of Prices at midwestern condenseries | 3.183 |
| Per pound average Wisconsin State Brand Cheddar, f.o.b. Wisconsin Assembly points | .34839 |
| Non Fat Dry Milk Solids | |
| Average of daily prices hot roller process dry skim milk "other brands, human consumption, carlots, bags or barrels" | .13375 |
| Average carlot f.o.b. manufacturing plants in the Chicago Area Sec. 927.46 (b) (7) | |
| Spray Process | .15130 |
| Roller Process | .13430 |
| Weighted average of Spray and Roller prices | .13940 |

October 4, 1956

A. J. Pollard
Acting Market Administrator

[12,133] By Mr. WINTON:

Q. Federal regulations, by attaching certain economic consequences to the uses of milk, may make it necessary, as an economic matter, to serve one market or the other, might they not?

A. It might change the degree of advantage that existed previously, yes.

Q. And isn't it in fact your intention to cause a separation of the supply of North Jersey from the supply of New York City and the other markets we have been discussing?

A. An order would define the supply. It is necessary, if you are going to have an order, to define the supply.

Q. Wouldn't it separate that supply from supplies for other markets?

A. In defining such a supply, and changing the degree of advantage for what the handler might do with his milk, that might well be accomplished.

Q. Bearing those answers in mind, should a Federal order force, by these regulations, through its economic pressures, a change in the normal economic operation of a business supplying more than one market?

A. I believe that all Federal orders change the normal relationships and the normal competitive situation that exists in an area, and if it is necessary to have Federal orders it is necessary to do that.

[12,134] Q. Even in the absence of Federal orders, wasn't it customary for the same sources of supply to be used as I have described by a very great number of operators, namely, part of the time for North Jersey and part of the time for other markets, and part of the supply at all times for North Jersey and part of the supply at all times for other markets?

A. I presume that your characterization might apply to some part of the milk supply for North Jersey. However, I would doubt that there would be any serious disruption of practices due to the regulation by the proposed order.

Q. Will you explain that last answer? Why do you doubt it?

A. Simply because I do not believe there is any large number of plants that depend, and have to depend, upon being able to supply the North Jersey market and some other market.

Q. Did you look at the list that Dr. Pollard put in evidence, of the number of Order 27 plants which ship into North Jersey?

A. Not recently.

Examiner HYDE: Is that Exhibit 168?

Mr. WINTON: It couldn't have been recently. It is Exhibit 168, list of plants under Federal Order No. 27 and New York State Order No. 126 which shipped Class I-C milk into northern New Jersey during October, November or December, 1943-1948.

[12,135] The WITNESS: I have the list before me now.

By Mr. WINTON:

Q. Doesn't that seem to indicate that the situation I described is a very prevalent situation?

A. Mr. Winton, I would like to point out that this covers a period of five years. It relates to any quantity of I-C milk shipped into northern New Jersey. It comes in under a price which is not a full fluid milk price. It was part of the——

Q. You say that before you have looked at it. Why don't you look at it first?

A. I am not saying that before I look at it, Mr. Winton. I am reading the heading of this, which says plants which shipped I-C milk into North Jersey during a period of five years.

Q. And you haven't yet looked through the list of plants, have you? You are giving me an explanation before you have even perused it. You only looked at the first page.

A. I am only explaining so far what is on the first page.

Q. My question is addressed to the whole document.

A. What was the question?

Mr. SWOPE: Why don't we let the witness answer his question in his own way. He is being harried, now.

Examiner HYDE: I would think so. He has only [12,136] answered on the first page, and you have not waited for him to go through the document.

Mr. WINTON: By way of explanation as to why I am objecting, I asked him to look at the document and explain it and its effect on what he said before. Without looking at anything but the caption on the first page, he began to show that the document in no way could affect his conclusions.

It seems to me that shows a fixity of opinion which requires some explanation.

Examiner HYDE: You let the witness answer the question. He started on the first page and he has more than one page there. He had no opportunity to finish his answer.

The WITNESS: I was stating this was I-C milk which comes into New Jersey, and indicates part of the problem, a hearing to regulate the sale of milk in North Jersey. There are, perhaps, 40 plants on a page here, and they are divided up by years. I note that most of them are repeated in the following years.

Mr. LENT: Mr. Hearing Officer, if it will help the Examiner and the witness any, I will say we had two economists make a count of the number of plants on that total list, and there are 144 different plants on the list. I think you can assume the truth of that for the sake of your questions and answers.

[12,137] By Mr. WINTON:

Q. Does that statement help?

A. Yes, that helps to clarify the number of plants which are involved. The fact still remains that this is I-C milk which is part of the problem that necessitates regulation in North Jersey, and this does not state the quantity of milk that came in.

It does indicate, however, that there must be a very large quantity of milk approved for the North Jersey market.

Mr. LENT: At times.

The WITNESS: At the time covered, yes.

By Mr. WINTON:

Q. Does it not indicate that the available supply is something different, available in the sense that it is supply the moves in competitively all the time as something different from the regular supply?

I will withdraw that and rephrase it. Doesn't this indicate to you that the supply of milk which moves into North Jersey 100 percent all the time is something very different from the available supply, namely, the supply which actually feeds the consumers of North Jersey?

A. Yes, it does indicate that the regular suppliers of the North Jersey market must be in competition with plants whose primary purpose is supplying the New York market, or [12,138] they wouldn't be Order 27 plants.

* * * * *

[12,193] Q. I just wanted to get that clear before we started the cross-examination.

At page 3, you say: Milk may enter as shipments to [12,194] a handler from plants which, for some reason, do not choose to meet the pool plant requirements and participate in the pool. You say "do not choose." You didn't mean to limit that to cases where the handler had an actual choice, did you?

That sentence and what follows also applies where the handler was unable to supply the market with enough milk to become a pool plant, isn't that correct?

A. You said on page 3?

Q. Yes, under the heading "Non-Pool Milk Under Proposed Order," you say, "Milk from non-pool plants may be expected to enter the market in two ways," and then

comes the sentence I called your attention to, and then comes another sentence which gives the second way.

The first way seemed to be limited to plants which voluntarily chose not to meet the pool plant requirements. Now, I ask you whether you also intended to include in that category plants which had no choice because they could not find a market of the required percentage in Order 90?

A. Well, I think the sentence was intended to cover any that did not meet the pool plant requirements, and whatever difficulty there might be in meeting the pool plant requirements would be part of the factor involved in their choice.

Q. You can envisage, can you not, a handler who is [12,195] experiencing great difficulty meeting the competition of Order 90 handlers, and who wishes to get into Order 90 but he can't find a market for 60 percent of his receipts during the four short months, and therefore, has no choice, he just simply can't get into Order 90; isn't that correct?

A. In that case, then, he would be required to pay compensatory payments on his Class I sales in the market.

Q. In other words, as far as your thesis is concerned, it is unimportant whether or not he does, in fact, have a choice to be regulated or not regulated?

A. I believe it is impossible to administer an order on the basis of what an administrator might think someone had in his mind. The measuring stick has to become the pool plant requirements.

Q. Suppose he could demonstrate, by evidence not as to what he had in his mind, but by evidence as to the sales in the marketing area, by evidence that they were fully met by other handlers so that he couldn't hope to get 60 percent. Would he be subject to compensatory payments?

A. Yes, if he did not meet the pool plant requirements.

Q. As the second way milk may be expected to enter the marketing area from non-pool plants, you say milk may enter as packaged milk on regular retail and wholesale

routes of a handler whose principal milk distribution business is outside of the marketing area.

[12,196] Do you refer only to regular retail and wholesale routes operated by such a handler, or do you also envisage in that sentence a handler who sells milk in packaged form to dealers or sub-dealers who operate regular retail and wholesale routes in the marketing area?

A. It would include both.

* * * * *

[12,198] Q. In the part of your statement on the bottom of page 3 and the top of page 4, you seem to think that this 25 percent rule, that is, the rule on route sales up to 25 percent, is permission to sell without making payments into the pool, is that correct?

A. Well, it is providing they met the other requirements of this section, which is that their total payments to producers are equal to the payments which would come about through their utilization priced at New Jersey prices.

Q. Let's see how that would work out in an actual example. Suppose you had a non-pool plant in Pennsylvania. [12,199] Suppose the value of all the milk there at the New Jersey Order 90 prices would be $100,000. Suppose that the price which that plant actually paid to its producers was $90,000, so that it has paid its producers $10,000 less than its receipts at the North Jersey class prices.

Suppose it shipped 1000 quarts of milk into the North Jersey marketing area on its own routes. What compensatory payment, if any, would there be?

A. The compensatory payment would be $10 a quart or the difference between Class I and Class II, whichever is lower, and in this case it would be the difference between Class I and Class II.

Examiner HYDE: Dr. Brown?

Dr. BROWN: Sir, the witness said $10 a quart. Did he mean per hundredweight?

Mr. WINTON: No, a quart.

By Mr. WINTON:

Q. In that case, even though the 1000 quarts sold into the marketing area was less than 25 percent of the plant's receipts from producers, it would have to pay a very substantial compensatory payment?

A. The difference between Class I and Class II, yes.

Q. So there is some modification necessary of the statement at the top of page 4 that you could make shipments without making compensatory pauments [sic] into the pool. [12,200] A. I don't think any modification would have to be made of that statement. It says you could. It would be possible, it would allow a handler to do this, but it doesn't necessarily say that all handlers would be exempt.

Q. Whether or not they would owe compensatory payments would turn on whether they had paid producers at least the blend price which would result in pricing all their receipts at their plant at the New Jersey Order 90 prices?

A. That is correct.

Q. What is the reason for taking into account all the prices paid all producers in connection with compensatory payments on only part of the receipts into the marketing area?

A. So as to establish a price on the milk which is sold in the marketing area that is comparable with the price paid by handlers who are operating under the order.

Q. If this doctrine has validity, why couldn't it be applied generally, without being limited to route sales equal to 25 percent or less of the receipts from producers of the non-pool plant?

A. Because the route sales would only apply to those plants which are located adjacent to the marketing area, and have normal distribution of milk in packaged form on routes within the marketing area. The plant which is shipping in bulk milk or milk from a considerable distance from the [12,201] marketing area, it seems to me, is in an entirely different classification, in a different situation.

Q. If such a non-pool plant shipped more than 25 percent of its receipts into the North Jersey marketing area, and if its individual handler blend at the North Jersey prices would have been no higher than the price it actually paid, why should it be subject to compensatory payments, if the purpose is to put the non-pool competition on the same footing as the pool handler?

They would both have the same cost under that assumption, would they not?

A. That is entirely possible, and would be the effect of making a handler pool out of the entire order.

It seems to me that there are very good reasons why it would be difficult to operate a handler pool as far as North Jersey is concerned adjacent to the New York order with its market pool.

Q. I don't quite follow that answer, Doctor. What I am asking is this: If the purpose of compensatory payments is to put the non-pool handler on the same cost basis for his sales in the regulated marketing area as the pool handler, why isn't the principle which you establish for route sales up to 25 percent of his receipts equally applicable to all his receipts sold into the regulated marketing area? What is the line of distinction in theory?

[12,202] A. I can give you what I think the theory is. The order would be set up to regulate the marketing of milk in North Jersey. Unfortunately, it is very difficult to draw a line around a marketing area where there is not some milk that crosses on retail routes from adjacent areas into the marketing area.

Therefore, we have proposed this possibility of a compensatory payment as a means of regulating the price of that particular milk without making it necessary to continually keep expanding the extent of the marketing area regulated by the order. It doesn't seem to me that the same proposition applies to the other types of plants that you are speaking of.

Q. Doctor, what I am trying to find out is since the basis

of the compensatory payment, as I understand your statement, is to put regulated and unregulated handlers on the same cost fotting [sic] as to their sales in the regulated marketing area, on what basis do you draw a distinction between whether those sales constitute 25 percent of their direct receipts and are made in packaged form, as against sales which constitute more than 25 percent of their receipts and may or may not be made in bulk form?

A. The proposal that we have made with regard to the 25 percent, it seems to me, in substance treats certain plants and gives them a handler pool status under the order. If you gave the same status on all milk, regardless of the [12,203] percentage that it might be of the total sold in the marketing area, as to whether it was packaged milk or bulk milk, what you would have in effect, a handler pool order for the marketing area.

I don't believe it would be possible to operate a handler pool order in this particular marketing area. At the same time, I think it is very desirable to try to arrive at some means of limiting the pressure for the continual extension of these marketing area.

I believe that the suggestion we have made as to how this might be done has considerable merit, and I think should be tried to see if it will work. I believe it would. I don't know whether I answered your question or not.

I am not sure that the 25 percent is a valid point, whether it should be 25, 26 or 24. It seems to me at some point this plant becomes engaged primarily in supplying the North Jersey market. At other points the North Jersey market is more or less incidental to its other business in some other area.

For instance, these plants across the Delaware River in Pennsylvania, their business is primarily in the Pennsylvania market. Incidentally, they do sell some milk in North Jersey. If they were selling 50 percent of their milk in the North Jersey market, I would say that that certainly is their principal business. So I don't know that [12,204] when we said 25 percent we have the exact percentage that should

be used there, but it seemed to me at least, and I believe to the other members of our group that worked on this, that that was a reasonable figure to use.

Q. Would the inference from that be that any company that sold more than 25 percent of its receipts into the Order 90 marketing area is in the major business of supplying the Order 90 marketing area?

A. Yes, I think you could make that inference. Understand, of course, that this does not apply to a plant which is an order plant under some other market.

Q. What troubles me is that I am trying to tie that 25 percent figure together in my own mind with the requirement that for being a pool plant in the short months you must ship 60 percent.

There seems to be some inconsistency there, because on the one hand you seem to say if it ships over 25 percent it ought to be in the pool, and on the other hand you seem to say it can't get into the pool unless in certain months it ships 60 percent.

Would you care to comment on that?

A. Mr. Winton, I don't see any particular inconsistencies between those two percentages.

Q. Would you not conclude from the fact that if you said that if he ships over 25 percent of his milk into the [12,205] marketing area he is primarily engaged in serving the marketing area, that he ought to be entitled to be a pool plant, if he ships over 25 percent into the marketing area?

A. This applies, again, to plants which are packaging milk for distribution on their own retail routes or, as I have indicated here, I see no reason why it wouldn't also apply to sales to sub-dealers.

It seems to me that is quite a different situation in trying to make a provision that will make it possible for those plants to operate under a handler pool basis than it is to make a similar percentage provision for a country plant

that would be in the business of supplying milk in bulk to the marketing area.

Q. Without agreeing or disagreeing with that, wouldn't it seem to follow from what you have been saying that if a bottling plant was supplying the North Jersey marketing area with over 25 per cent of its receipts from producers, it ought to be a pool plant under Order 90?

A. No, I don't believe so. I think the assumption is made here, and it seems to me very correctly, that this plant is engaged in selling bottled goods in other marketing areas. Admittedly, there is no requirement here that it is, but any plant that would be located adjacent to the marketing area and incidentally selling milk in the marketing area on retail routes or to sub-dealers, I think could be determined [12,206] to be selling packaged goods in some other area other than the marketing area.

Q. I wasn't questioning that, and maybe we have gone as far as we can go on this. I will take one last chance at this, and if we can't get more light I will drop it.

I understood you to say that if a plant supplied over 25 percent of its receipts in the form of packaged goods to the North Jersey marketing area, its business would be mainly that of supplying the North Jersey marketing area. That is what I understood you to say, and that is why you drew the distinction which you have in Section 990.98.

If that is true, wouldn't it follow that it ought to have a right to be under the order if 25 percent of its receipts were sold in packaged form in the North Jersey marketing area?

A. I don't believe that it would follow. As I say, I don't know that the 25 percent is the exact figure that ought to be used here. I think it does express the reason why we had attempted to write a percentage such as this in.

Q. I will go to another aspect of this which you touched on. You said this particular provision permitting a special rule to apply on compensatory payments up to 25 percent of the receipts which are distributed on route sales in the

marketing area had something to do with an individual handler pool.

[12,207] I take it you think that these handlers who would not be regulated would be individual handlers regulated by some other authority or not regulated at all, but who would operate on an individual handler pool basis; is that correct?

A. It seems to me that is very correct, and I would like to add why.

Q. I would be happy to hear why.

A. The Order 27 plants, this, of course, would not apply to them because they would be regulated under some other Federal order, and the compensatory payment provision with regard to milk from another Federal order would apply in their particular case.

These would be plants adjacent to the marketing area. I know of no other plants adjacent to the marketing area that wouldn't be paying producers on an individual handler pool basis.

Q. If they were in New Jersey, they would be regulated by OMI; is that correct?

A. If they are located in New Jersey, they would be regulated by OMI; yes.

Q. If they were in Pennsylvania, what would the regulatory situation be about a plant which shipped into North Jersey and possibly also disposed of some of its milk in Pennsylvania? Would you enlighten us on that?

A. Well, the plant in Pennsylvania would be regulated [12,208] under the Pennsylvania Milk Control Commission, in so far as its sales in Pennsylvania were concerned.

Q. Would there be any regulation of the prices on its sales to North Jersey?

A. No, there would not be. Somebody asked me if I was sure of that.

Mr. Swope: Mr. Hearing Officer, I am forced to object to the question now on the ground that this witness has been qualified as an economist, and not as a man who is expert in Pennsylvania milk control law. His last answer forces

me to do that. I know that he has some familiarity with the Pennsylvania milk control law, but I would like the record to show an objection at this point.

Mr. WINTON: I find it difficult to draw the line when you are dealing with economics of milk regulation, between familiarity with the regulations which affect the economics and economics in a vacuum without regulation.

Mr. SWOPE: Mr. Hearing Officer, to put it bluntly, the witness' last answer is wrong.

Examiner HYDE: Let the witness be heard. I think he has something more he wants to say.

Mr. WINTON: Can we have a short recess?

Examiner HYDE: Before the witness is heard on this?

Mr. WINTON: Maybe he would like to speak to these people during a short recess and get the thing straightened [12,209] out.

Examiner HYDE: We will have a brief recess.

(A short recess was taken.)

Examiner HYDE: The hearing is in order.

By Mr. WINTON:

Q. Do you wish to comment further on the last answer that you gave?

Examiner HYDE: Did you want to say something, Mr. Williams?

Mr. WILLIAMS: I might say that any time now Mr. Winton can feel free to ask the witness whether the witness adopts the quotations from the Federal Order Study Committee.

Examiner HYDE: Wait a minute. We are not on that. We are on something else.

Mr. WILLIAMS: I know, but I just thought I would mention that.

Examiner HYDE: The reporter will read the last question before the recess.

(The reporter read from his notes as requested.)

The WITNESS: Yes, I would like to make this comment on it. The question was with regard to the control of the price of milk sold from a Pennsylvania plant out of state. I answered in terms of the situation that exists in the area of Pennsylvania adjacent to North Jersey, and I believe my answer is very much correct as far as that [12,210] particular situation is concerned and as far as that is concerned my answer is correct as far as all of Pennsylvania is concerned at the time that I introduced this statement.

The Pennsylvania Milk Control Commission has, in the past six months or so, written some orders for western Pennsylvania, in which they are pricing milk sold in Ohio at what they find to be the going price for milk sold in Ohio from Ohio plants.

It is possible that the Pennsylvania Milk Control Commission might extend that same type of regulation to include milk sold in North Jersey. At the present time I feel rather confident they don't.

Examiner HYDE: Dr. Brown?

Dr. BROWN: Are you discussing packaged milk or bulk milk?

The WITNESS: Packaged milk.

Dr. BROWN: Packaged milk only?

The WITNESS: Yes.

Examiner HYDE: Mr. Winton?

By Mr. WINTON:

Q. It would seem to follow from what you said both as to plants located in New Jersey and plants located in Pennsylvania that they would have an individual handler pool of some kind. Would that be true of plants which are unregulated and located in New York?

[12,211] A. I would think so; Yes.

Q. You take a plant like the Sheffield plant at Homer, or the Borden plant at Washingtonville, which are not Order 27 plants. They don't have individual handler pools, do they?

A. Unless they are under some order, they don't have a marketwide pool. They are not influenced in what they pay producers by the utilization of some other plant.

Q. But they don't have any minimum pricing at all?

A. No. They are unregulated plants.

Q. Completely unregulated. The other plants in New Jersey and Pennsylvania are required, to a certain extent by state regulatory authorities, to pay minimum class prices, are they not?

A. To pay certain minimum class prices, and those plants are not.

Q. Bearing that in mind, the impact of this 25 percent exemption, if I might call it that—it is a limited exemption—might be different, depending on the location of the unregulated plant, might it not?

A. I would like to correct an answer which I gave to you earlier, in which I was being much more liberal with the application of this 25 percent than was intended when this was written, when the compensatory payment provision was written, or when my testimony was written.

[12,212] This 25 percent was intended to apply where the routes originate at the plant which packaged the milk. It wouldn't matter who owned these particular routes, whether they were sub-dealer routes or whether they were routes owned by the particular plant.

But it would not apply to plants which packaged milk some distance from the marketing area and then shipped it to the marketing area where it was reloaded on routes. It would apply only to the routes, route sales, originating at the plant where the packaging and processing of the milk was actually done.

I want to make that correction, because I think it has considerable to do with the other questions you are now asking.

Q. That would change a great many of the answers you gave, particularly those applicable to the Middletown operation and Slate Hill, would it not?

A. I don't know whether the routes originate at the Middletown plant or not. I guess they do not.

Q. They do not? That is, for North Jersey they do not?

A. Of course, the Middletown plant itself is an Order 27 plant, is it not?

Q. At the moment. It could be unregulated like the Washingtonville or the Homer plant, too, depending on the [12,213] types of regulations applicable to it.

A. That is right. I would like to have my answer show that this refers to packaged sales on routes originating at the plant where the milk is processed and packaged.

Q. What is the economic basis for distinguishing between the two kinds of sales of packaged goods?

A. I don't think it is so much an economic basis as it is an administrative and a regulatory problem, where we were attempting to present a possibility of regulating this milk without requiring that in all cases it come in under the order.

Q. Why should it make any difference whether the packaged milk leaves in a big truck which stops off at a sub-dealers and loads up his small truck, or whether the sub-dealer drives up to the packaging plant and loads up at the plant? That is what I am trying to get at.

A. I think the difference is whether there is a problem that can be coped with in this type of a compensatory payment provision.

Q. What is the difficulty about taking care of it where it comes in big truck loads which does not exist when it comes in on the small truckloads of the dealer or sub-dealer himself?

A. As I have stated, one of the principal reasons why we suggest this kind of a compensatory payment in this [12,214] exemption of 25 percent is to relieve the pressure that exists in Federal order markets to continually expand the marketing area. I don't believe that is a problem when the plant like Homer, New York, is packaging milk and shipping it to the marketing area.

Q. Suppose a plant like that at Slate Hill has a very substantial business in upstate New York and a very substantial business in North Jersey. Why isn't that a problem?

Why is it any different than the problem which obtains when the sub-dealer's trucks go right up to the plant?

A. I think it is different in that the plant at Slate Hill is, I believe, likely to be a pool plant under either Order 27 or under North Jersey, one or the other.

Q. Why wouldn't that be true one way or the other? That is, irrespective of the form of delivery, what is there about the form of delivery that changes the likelihood of its being or not being a pool plant?

A. I think the form of delivery creates a situation in which such a provision might be applied and might be administered. If it was attempted to apply it to plants where the milk was trucked in large trucks into the marketing area from any considerable distance, that would be very difficult to apply, to apply this kind of a provision.

Q. Doctor, I have heard you say that, but I don't [12,215] hear you say why. Let me just give you a hypothetical case. Let's assume two plants, one located at Slate Hill and one located, say, at Easton, Pennsylvania, and they each supply 25 percent to the North Jersey market and 75 percent to other marketing areas.

Routes originate directly at the plant in Easton but in the case of the Slate Hill plant the milk going into North Jersey comes in in trailer trucks and it is broken up into smaller lots at the various locations of the sub-dealers.

Explain to my why one operation has more administrative problems than the other, when it comes to compensatory payments.

A. I believe that the situations are quite different in that the one processing plant is located in an area where its principal business is the distribution of milk in its own population center on routes originating at the plant.

In the other case, it is a plant more or less performing

the functions of a country plant, and then also processing milk for distribution over a considerable area. I think the situation is quite different, and it would be possible to apply this kind of compensatory payment in one situation whereas it might not be possible to apply it in the other.

Q. I think you have added things to my question which I didn't add, and which are, in fact, contrary to what [12,216] actually exists. In the Slate Hill plant, there are routes that load directly and they go into the surrounding area, but the milk going into North Jersey goes on trailer trucks.

I asked you to assume hypothetically that the percentages were the same in both cases, the only difference being the form of shipment. I am asking what the distinction is. In both cases there are routes that load up locally, but the routes that go to New Jersey from Middletown's plant go on trailer trucks, and the routes that go from the Easton plant go directly on the sub-dealers' or other dealers' trucks.

I am asking what the difference is between those two situations which requires or justifies a different result as to compensatory payments.

A. I would say that if you were going to have a provision such as this that can be administered, there must be some dividing line as between a country plant and a plant which is located in another populated area and is incidentally distributing some milk in North Jersey.

It seems to me that one feasible and administratively possible place for drawing that line would be in the terms of the routes originating at the processing plant.

Q. Suppose, as was testified to in connection with North Jersey plants, some of the milk that went into North Jersey left on trailer trucks, because it went, say, all the way down to Newark, and some was distributed locally in North [12,217] Jersey on direct trucks based at the plant.

How would you handle that? That is an actual situation that was testified to.

A. Yes. On that part of the milk which was distributed on retail routes originating at the plant, providing it was less than 25 percent of the receipts from producers, and providing they paid the handler pool price for their milk, they would not have to pay the compensatory payment.

Q. Do you think it would be administratively simpler to try to determine from the handler's records the form in which the milk was loaded at his plant, it all being packaged and it all going into northern New Jersey, than to treat them both the same way?

A. I don't know that it would be simpler. I do not think it would be impossible.

Q. What records would you expect a handler to keep, and how would the Market Administrator audit to see if those records were accurate? What external records would he check?

A. Well, he would have to audit the records of the route sales originating at that plant.

Q. Yes, but how would he know whether the particular sales left on small trucks or big trucks? What check would he maintain on that?

A. It would seem to me that a plant would have to keep their records in such a fashion that that could be [12,218] determined, whether they were the regular distribution routes or van routes hauling milk in quantity to some other plant for redistribution.

Q. I won't press you any further. I don't think the administrative problem is getting any simpler. Has it occurred to you that it is simpler because of this distinction?

A. As I have tried to point out to you, Mr. Winton, I believe it is quite important that there be some way figured out that you can control the marketing area of Federal orders, and I think a proposition such as this has considerable merit, that an attempt be made to use it in order to regulate this milk that comes into a marketing area in this manner.

Q. You have said you picked the 25 percent limitation

in part because up to that extent it would be all right to permit an individual handler situation to compete with the Order 90 pool; is that right?

A. No, I didn't use those words, I don't think.

Q. Isn't that the general thought? If I haven't stated it correct, will you restate it in your own words, on that aspect of it?

A. I believe what I stated was that up to some point it would be very possible for a plant operating in another populated area adjacent to the marketing area to have some incidental sales in the North Jersey marketing area; [12,219] that it was difficult to say where, exactly, this percentage would apply, what makes it incidental sales and what would be otherwise. We thought that 25 percent is a reasonable percentage.

Q. You are talking now about another aspect of your testimony, but I understood you to say that if you didn't have this 25 percent limitation you would be encouraging individual handler pools and that it would somehow be inconsistent with Order 90 as a marketwide pool.

Did I misunderstand your testimony in that respect?

A. Well, I stated that if you allowed any percentage, regardless of the percentage—90 percent or whatever it might be—that it would be a case of exempting all the milk from pooling, and would merely provide an individual handler pool market.

Q. Bearing that aspect of your testimony in mind, that has nothing to do, has it, with the extent of the business in the marketing area, but, rather, with the competitive situation in purchasing milk which would result?

A. Would you want to state your question again? I am not sure I understand your question.

Q. What would be wrong with exempting a handler who sold 50 percent of his receipts from producers in the marketing area provided he did not meet the requirements of being a pool plant, and provided that he returned to his producers [12,220] a price which was at least equal to what

his individual handler blend would be at the Order 90 prices? What is wrong with that?

A. In case of a plant supplying or selling that amount of its milk in the marketing area, on their regular routes, I think that would be at a point which was no longer incidental sales to his business in some other marketing area.

Q. It has nothing to do with the competitive situation on buying milk, then, but simply with the situation on selling the milk in the marketing area?

A. I am not sure—how do you mean on the competitive situation in buying the milk?

Q. I was wondering what you were trying to prevent, unfair competition in buying the milk or unfair competition in selling the milk.

A. The purpose of the compensatory payment is to prevent unfair competition in buying the milk.

Q. That is, I think, not the general understanding. The general understanding is that it is to prevent unfair competition in selling the milk because you bought it at cheaper than the class prices.

A. Again, this is a mistake in terminology, I believe. I am referring to the distributor buying the milk and not from producers, but from the plant outside, not a pool plant, selling milk to a handler regulated by the order. It [12,221] is an unfair advantage in buying milk for resale.

Q. Have you considered the effect of this 25 percent partial exemption in allowing an individual handler who is unregulated to operate in the same milkshed as the regulated handlers so far as purchasing milk from producers and possibly returning a higher price because of your set-up here with this limited exemption? That is, returning a higher price to producers because he is exempted, partially, from pooling?

A. You are asking me if I have considered that? In what respect?

Q. Have you considered whether or not that would give him a buying advantage in buying milk from producers in the same general milkshed?

A. I consider it quite possible that a plant located in Easton, Pennsylvania, or an area such as that, might be able to pay a better blend price to producers than would be paid by Order 90 plants. I think that would merely perpetuate the situation that exists at the present time.

Q. Now that Federal regulation is coming in, should you just perpetuate the situations that have existed, or try to bring about a more orderly alignment of prices?

A. I should think you might well try to do both, depending upon the particular situation. But I don't believe that the function of an order in North Jersey is to [12,222] regulate the prices paid by handlers whose principal business is outside of the marketing area.

Q. However, you will admit that handlers regulated by Order 90 might find themselves under competitive disadvantages in competing with these unregulated handlers for producers or dairy farmers milk in the same common milkshed as a result of the regulation which you propose?

That is, since the competition will be permitted to operate on an individual handler basis, and they would have to engage, to a certain extent, in marketwide pooling?

A. I wouldn't be afraid of that amount of competition for milk.

Q. It might cause premiums, might it not?

A. Well, it might cause the payment of some premiums in some cases, if the handler insisted that he keep that milk. The plants in a good many markets in Pennsylvania at the present time pay prices exceeding those of Order 27, and I don't believe it does any particular disadvantage to producers or to handlers.

Q. You are going to change the situation, are you not, since you are pricing up the market level in the Order 90 area to where it reflects the Class I price under an enforced Federal order as compared with whatever situation obtains in the absence of an enforced Federal order?

A. In thinking again of the markets in Easton, [12,223]

Pennsylvania, I don't believe that would create any particular hardship.

Q. Don't you think that the unregulated handler might be getting a bigger margin after Federal control than he did before?

Mr. SWOPE: Mr. Hearing Officer, I wonder whether Mr. Winton would explain to us what he means by "margin"?

Mr. WINTON: The prevailing level in the Order 90 marketing area would reflect an enforced and enforceable Class I price instead of that which it presently reflects.

Mr. SWOPE: Maybe that explains it to the witness. It doesn't explain it to me.

The WITNESS: You were speaking about——

Mr. SWOPE: I withdraw my objection, if the witness can answer the question.

Examiner HYDE: Maybe when the witness answers it will help you.

Mr. SWOPE: Maybe so, sir.

The Witness: You are speaking of an unregulated plant?

Mr. WINTON: That is right.

The WITNESS: And which is exempt from the usual compensatory payment under this order, located in Pennsylvania, and, due to the North Jersey order, it would have a wider margin than he currently has.

[12,224] Mr. WINTON: On his North Jersey sales, of course.

The WITNESS: On his North Jersey sales. I think that depends on what he pays producers for the milk that he sells in North Jersey. I don't know why, necessarily, he would have a better margin.

By Mr. WINTON:

Q. That is what I am driving at. If he gets a better price he can pay more to producers under the new system than he could under the prevailing system and, thereby, be in a better competitive situation as against the handlers who will be brought under regulation by Order 90?

A. Presumably he would have to pay a higher price than he now pays for that 25 percent of the milk. I don't know how that would widen his margin.

Q. Let me put it this way. Maybe "margin" isn't the best word. But the prevailing fluid price might be increased by the Federal order, because all handlers brought under regulation will have to pay a Class I price to producers. Is that right?

A. All handlers brought under the regulation would have to pay a Class I price for their milk, yes.

Q. Yes. So the prevailing price level might be expected to be higher than the one presently prevailing which reflets, in part, does it not, the fact that many handlers are not subject to OMI regulation, and can buy milk for fluid [12,225] use at different prices?

A. The cost of the milk would be higher if the Class I price is higher under the order than what they are currently paying. If it is higher, some producers would get the benefit of this higher Class I price.

Q. That is right. The unregulated handler's patrons would be exempted from pooling and would get this higher price directly under your proposal?

A. They would get it to the extent that milk was sold in the marketing area and at the present time is not returning a Class I price, those producers supplying the handler would get a somewhat higher price for their milk, yes.

* * * * *

[12,227] Q. If he could show that he paid this cooperative a price which would be equal to the Order 90 class prices, and that wouldn't be difficult to show—it would be easier to show than most things because there is one dealer dealing with one seller—why shouldn't he be entitled to the benefit [12,228] of this 25 percent exemption?

A. Well, I believe that it would be a much more difficult thing to show that he had paid the cooperative the class price for the milk.

Q. Why would it be difficult? He pays the cooperative so much. That can be shown in dollars and cents. You can then compare that with the Order 90 class prices for those utilizations and you can tell, without any further investigation, whether or not he is paying for that milk what would have been paid under Order 90. Why is that difficult to do?

A. Well, in one of these reports of this committee that I quoted from it is stated, "Unaffiliated plants, by means of tie-in transactions or other arrangements, could adjust billing prices for the mutual benefits of both concerned. Such practices are difficult to detect and difficult or impossible to regulate."

I think that would describe the arrangement that might exist between this plant and the supplying plant. Therefore, I think it would be administratively much more difficult to regulate.

Q. Getting back to the example I asked you earlier in your testimony about, where you assume that the New Jersey prices would be $100,000 and that producers were paid $90,000, with a difference of $10,000 and 1000 quarts were shipped into the marketing area, you said that the compensatory payment [12,229] would be the lower of—what was it, $10 a quart or the difference between Class I and Class II prices under Order 90?

Well, in Section 990.98, the first paragraph, it would seem that the handler would have to pay the difference between the class I and Class II prices on all the receipts, not only the amount sold into the Order 90 marketing area.

Is that intentional?

A. No.

Q. You don't propose that that be done?

A. The intention is that it be that compensatory payments be on Class I sales in the marketing area.

Q. And on the difference between Class I and Class II on only that volume?

A. On the volume of the Class I sold in the marketing area.

Q. How would you determine which Class I and which Class II price to use for the purpose of the compensatory payments? In other words, there are zone differences.

A. I would use the Class I and Class II prices which apply in the zone in which the plant is located that originates the milk.

* * * * *

[12,417] Q. Doctor, that is proceeding part way. But why should there be any compensatory payment at all if that milk were paid for at the class prices of Order 90, and it could be so established?

A. I think the primary problem is one of administration. For example, the compensatory payments that we have proposed treats milk under another Federal order, where the pricing of that milk can be ascertained in a different manner [12,418] than it treats milk originating from other plants, where it would be more difficult to ascertain the price paid for the milk.

* * * * *

[12,424] Q. Then let's pass on to the Market Administrator. The Market Administrator in auditing the books of a dealer who operates in Pennsylvania and ship some bulk milk into northern New Jersey would be able to determine by an audit what had been paid for the milk, wouldn't he?

A. I don't think the Market Administrator can be expected to audit all the books of all dealers who might have what would otherwise be surplus milk, which they might want to send into the marketing area in bulk.

Q. We don't want to strike the basic legal fundamentals just because it might be inconvenient for some Administrator to look into the matter, do we?

A. Again, Mr. Daniels, I don't know that I have any comment to make on that.

Q. He is compensated for whatever he does, isn't he,

by the handlers? That is the only means of compensation established, isn't it?

A. He is compensated by the handlers who are operating under the order, but I couldn't very well expect the handlers operating under the order to pay the Market Administrator for auditing books of handlers who are not under the order.

Q. He can be compensated by a handler who ships milk into the area, as a matter of a provision of the [12,425] order, can't he?

A. He could be, but I don't believe the compensation on that milk would be adequate to cover it.

Q. That is a detail, isn't it? That weakness could be corrected, or the amount could be made adequate? That is merely a detail, isn't it?

A. We have not proposed sufficient compensation to cover all the circumstances which might develop with bulk shipments.

* * * * *

[12,429] Mr. WARE: I have one or two further questions.

By Mr. WARE:

Q. Under this proposed Order 90, who are the producers for whom minimum prices are established? They are producers delivering to what plants?

A. To the plants that would be order milk plants.

Q. The only handlers that would be required to pay the minimum prices established under the order are those which are defined as order milk plants; is that right?

A. Except for the compensatory payment requirements.

Q. In the case of those handlers, they are not required to pay their producers the minimum prices established under the order, are they?

Mr. DANIELS: What handlers, Mr. Ware?

Mr. WARE: Handlers of plants that are not fully regu-

lated, handlers of plants other than order milk plants as defined under the order.

The WITNESS: They are not required by the order to pay any particular minimum price to producers.

By Mr. WARE:

[12,430] Q. Who are the producers under that sort of an arrangement that are relied upon to provide an adequate supply of milk for the market?

A. The producers delivering milk to the order milk plants.

Q. And under the proposed provisions, a country shipping plant, except those who had made application for designation as an order milk plant, leaving aside those particular plants, then a plant would become an order milk plant in any particular month only if he shipped to the marketing area 65 percent or more of his receipts from producers at that plant; is that right?

A. That is correct.

Q. And if he shipped less than that, he would not be an order milk plant and, consequently, would not be fully regulated, and the minimum price established under the order would not apply to the producers from whom he received milk; is that right?

A. The uniform price to producers, that would not apply; no.

Q. And the minimum class prices, he would not be required to pay minimum class prices under the order unless he shipped 65 or more percent as Class I milk to the marketing area?

A. The order would not require him to pay any particular prices to producers.

[12,431] Q. Let's assume, then, that we have two plants in the same general area, let's say 150 miles from Newark, in Pennsylvania. One of them ships, in a given month, over 65 percent of his receipts from producers into the marketing area, which is classified in Class I. He would then

become a fully regulated plant for that month and be required to pay minimum prices, and the minimum price established would be the uniform price under the order, is that right, to his producers?

A. That is correct.

Q. And if a plant in the same area, another plant in the same area, also shipped Class I milk to the marketing area, but only shipped 60 percent of his receipts from producers at that plant, I take it that that is some of the milk to which the compensatory payment would apply if he did not qualify as an order milk plant and thus become fully subject to regulation?

A. That is correct.

Q. If it was established that all of the milk received at the second plant was sold for Class I use, partly in Pennsylvania and partly in northern New Jersey, and that he did pay producers the full Class I price for that milk, what would be the competitive situation between those two handlers from the standpoint of procuring milk from producers?

I guess I need to add another condition. And also [12,432] assuming that in that event there was no compensatory payment charged against the handler who did not qualify as an order milk plant.

Mr. DANIELS: What was the addition, please?

Examiner HYDE: The reporter will read the addition.

(The reporter read from his notes as requested.)

Mr. DANIELS: Thank you.

The WITNESS: At least for that particular month, the plant with the full Class I use would be paying producers a higher price.

By Mr. WARE:

Q. He would be able to return to his producers a full Class I price for all of the milk as against the fully regulated handler who would be in a position to pay only the

blend, unless he voluntarily paid additional premiums, is that right?

A. That is right.

Q. The producers at that unregulated plant, I think you indicated earlier, would not be among those relied upon for an adequate supply of milk for the market.

A. Certainly not to the same extent as those delivering to order milk plants.

Q. Would not that sort of an arrangement, under which a handler shipping as high as 64 percent of his receipts of milk into the marketing area for Class I use, and being in [12,433] a position to return all of that money to his producers, as distinguished from the situation applicable to fully regulated handlers who participate in equalization, would not that arrangement tend to defeat the purposes of your market-wide equalization arrangement?

Mr. DANIELS: Just a minute.

The WITNESS: Yes, I——

Mr. DANIELS: Just a minute. The 64 percent and the 60 percent, that is the same plant, is it? He just bumped it up four percent?

Mr. WARE: That is right. It could go as high as 64.

Mr. DANIELS: I wanted to see if we had a third plant in there.

Mr. WARE: No, it is the same plant. That is all.

Examiner HYDE: He hasn't answered yet.

Mr. WARE: Yes, he did.

Examiner HYDE: Read the answer, please. I didn't hear it.

(The reporter read from his notes as requested.)

Examiner HYDE: Do you want to add anything?

The WITNESS: Let's remove the "I".

Examiner HYDE: Anything else from this witness?

Mr. DANIELS: Yes, indeed.

Examiner HYDE: Go ahead.

[12,434] By Mr. DANIELS:

Q. Dr. Pierce, what do you mean when you say producers relied upon, or what did you understand Mr. Ware to mean when he said producers relied upon?

A. Producers delivering to plants that are engaged in servicing the North Jersey market with milk for fluid use.

Q. Well, a plant in Mr. Ware's example could qualify for just one month and not qualify for the other 11 months. How are they relied upon to service the North Jersey market?

A. Well, they are relied on at least during that particular month.

Q. And so is the unregulated plant relied on during that particular month. They ship milk in here just with the same regularity under his example as the regulated plant. So the burden carried, or the obligation carried, or the service offered by the two sets of producers shipping to the two different handlers is exactly the same, isn't it?

A. But the plants which would be primarily responsible for supplying milk to the market would be those that were regularly designated as order plants.

Q. But that wasn't Mr. Ware's question. He said this plant qualified for a month by shipping 65 percent, and the other plant didn't qualify for that same month because it only shipped 60 percent.

Certainly the fact that one is under the order for [12,435] that month and the other isn't doesn't give the producers any different status so far as servicing the market is concerned, does it?

A. Well, it does for that particular month.

Q. How, Dr. Pierce? How? Where is there a greater reliance upon producers or a great obligation on those producers that ship to a plant that is qualified for one month than the producers that are shipping for that one month into the area through a plant that is not qualified?

A. Because that particular plant either contributes to the uniform price in the market, which is paid out to all of

the producers of order milk plants, or has available an extra 35 percent of the milk that could be used in the market.

Q. Is that your only reason? You think that fits the definition "producers relied upon"?

A. It indicates that they make a contribution during the month when they are an order plant.

Q. And their contribution being the shipping of milk or being subject to the pool? Which is the contribution?

A. Well, if the other 35 percent of their milk were used as Class I someplace else, they would be contributing to the uniform price that goes out to all order producers. If they were not using this other 35 percent for Class I in some other market, the 35 percent would be available to the market.

[12,436] Q. You mean, then, they are making a contribution to their co-producers, not to the market—not to the market, but they are contributing some money to the co-producers?

A. Who are depended upon for the regular supply of milk.

Q. That bothers me. How are producers depended upon? A producer can stop any time he wants, can't he? He doesn't have to ship milk into this market any day.

A. That is correct, he doesn't have to; no.

Q. And he is under no sanction, if he decides to quit, is he?

A. Well, let's be practical, Mr. Daniels.

Q. That is what I am trying to be, rather than this theory that we are spinning. I want to be practical. No producer is under any sanction to continue to sell milk in this area, is he?

A. No producer is forced to continue to sell milk in this market. Any producer at an order milk plant would probably find it advantageous to continue selling milk in this market.

Q. But he could discontinue, and may find it advantageous to discontinue?

A. It is possible.

Q. Now, Dr. Pierce, since you want to be practical, it is not very practical to assume that this 60 percent plant [12,437] had all of his receipts used 100 percent in Class I, either, is it? That is not being very practical, is it?

A. It is not probable. I believe it is perhaps possible.

Q. Yes, it is possible. You don't support compensatory payments on that theory advanced by Mr. Ware through his questions at all. That is not in conformity with your definition or your basic reasoning in back of compensatory payments, as I see it, is it? That might be Mr. Ware's, but it isn't yours, is it?

A. The compensatory payments are one part of the total order provisions, and the total order provisions, one of their purposes, is to maintain an adequate supply of milk for this marketing area.

Q. Maintain an adequate supply of milk for whom? You are thinking about what segment of our population when you say an adequate supply of milk?

A. I was thinking about the population that resides within the marketing area and consumes milk within the marketing area.

* * * * *

[12,442] By Mr. WIXTON:

Q. We have a non-pool handler in Pennsylvania. Presumably he is regulated by the Pennsylvania Milk Control authorities. He has a market in Pennsylvania for part of his milk supply as Class I, and he is required, we will assume, to pay the Pennsylvania Class I price on that milk.

For the rest of the milk he has to figure what his real cost is, and I assume his real cost you would agree would be what it would be worth to him in the alternative [12,443] opportunities to dispose of it, when he is comparing what he can get out of the milk by selling it in the Order 90 market. Isn't that correct?

If he could only manufacture the milk, then when he

comes to deciding whether to sell it into the Order 90 market, he will say, "My real cost is what I could get out of manufacturing this milk, and I will compare it with what I would get if I sold it into the Order 90 market."

A. Well, it would seem to me, Mr. Winton, that that is only part of the picture, because if he sells it into the order market, and the provision that we have proposed applies, then he would be required to pay producers the full class price for that milk.

Q. That is what he would take into account, how much he would have to pay producers and how much he would get. He would compare the resulting difference with what would happen if he sold that milk for manufacturing and paid producers whatever manufacturing price he would have to pay, and he would also take into account his competitive buying price from the producers which would result. Isn't that right?

A. That would be true.

• • • • •

[12,450] Q. Dr. Pierce, one simple way to make sure that all handlers selling Class I milk in the area paid the same price for that milk would be to apply the minimum pricing [12,451] and pooling provisions of the order to all handlers who sold any Class I milk in the marketing area, is that right?

A. I am sure that is the very simplest way to do it, Mr. Ware.

Q. So that this proposition of exempting from full regulation certain handlers who only incidentally sell some Class I milk in the area, and applying to them a compensatory payment on such milk as they do sell, is an alternative to full regulation and a means of relieving such handlers of the obligations which otherwise would be imposed, is that not correct?

A. That is one reason this is proposed; yes.

Mr. WARE: I have nothing else. Thank you.

Examiner HYDE: Anything else?

By Mr. DANIELS:

Q. That is only one alternative. There are others, aren't there?

A. Yes. We could put the United States under one order.

* * * * *

[12,639] AFTERNOON SESSION

1:45 P.M.

Examiner HYDE: The hearing is in order.

Mr. WILLIAMS: Mr. Presiding Officer, one of the remaining witnesses is Clare L. Pineo, whose testimony on the Northern New Jersey Marketing Area appeared in Exhibit 30; also his testimony on amending the definition of pricing of Class I-C milk appeared in Exhibit 48.

Now, Mr. Pineo is no longer an employee of Eastern Milk Producers Cooperative Association, and although he has been made available for cross-examination, I would like to have him treated, if it is agreeable to everybody, in the same manner as Mr. Steck. Now, if there is any cross-examination, maybe the persons that have those questions would make their wishes known, and then we would know how to proceed.

Examiner HYDE: What are the exhibit numbers, please?

Mr. WILLIAMS: 30, Northern New Jersey Marketing Area; and 48, proposal for amending a definition of pricing in Class I-C milk.

Examiner HYDE: 48?

Mr. WILLIAMS: 48.

Examiner HYDE: In addition to that we have a motion to strike pending on Exhibit No. 30-A.

[12,640] Mr. WILES: Mr. Hearing Master, with respect to the motion made on Exhibit 30-A, it was made by Mutual, and would be withdrawn at this time.

Examiner HYDE: Thank you very much. That clears 30-A.

Mr. LENT: Mr. Pineo is not present in the room at the moment, but he can be brought here, if anybody wants to ask him any questions. He is doing some other very important work some distance away for his present employers, and they are perfectly willing to produce him, because he did testify on behalf of Eastern.

But if nobody wants to cross-examine him at this time, it would suit his convenience and that of his employers if he did not have to come here and present himself in the flesh.

Examiner HYDE: What is your pleasure?

Mr. WINTON: As far as the groups I represent are concerned, we would like to handle it the way we handled the cross-examination of other witnesses today, that is, we have no cross-examination at this time. We hope we won't have any, but we reserve the right, if it should become necessary.

Examiner HYDE: And you recognize that hazard?

Mr. WINTON: And we recognize the hazards, and we certainly don't want to have Mr. Pineo brought here at this [12,641] time. We don't think that it is necessary.

Mr. LENT: I have to respect the reservation in this case, inasmuch as I have some control over Mr. Pineo in his employment, and inasmuch as he isn't here; but I don't want my doing so to be any precedent for allowing reservations of cross-examination of any witnesses I hereafter produce.

Examiner HYDE: Well, as I understand these reservations today, these reservations have been made in the belief and in the hope—a lot of it is hope—that it won't even be necessary when we get a little further on. That's the way I take them.

Now, we are referring to 30 and 48, is that right?

Mr. LENT: 30-A.

Mr. WILLIAMS: And 30-A.

Examiner HYDE: Now, Exhibit No. 30 has been received. It was received on August 21st for the tables.

Mr. WILLIAMS: I move it for——

Examiner HYDE: Well, that's as far as we need to go on that, the tables.

Now, Exhibit No. 30-A has some tables attached, and we haven't disposed of those. Exhibit No. 30-A was pending for the tables on the last page. There are some tables scattered throughout the statement, but they were read. [12,642] Do you offer that last page, Mr. Williams?

Mr. WILLIAMS: I'd like to take a look at it first, but I imagine I certainly do, if I offered it once. But I just don't have it in front of my hand right at this moment.

Examiner HYDE: You can look at mine.

(The document in question was handed to Mr. Williams.)

Mr. WILLIAMS: Yes, I offer that for the purpose of the table. To the objection I'd like to argue.

Examiner HYDE: The objection has been withdrawn.

Mr. WILLIAMS: Oh, all right.

Examiner HYDE: This table is captioned, "Summary of Incomplete Survey by the New Jersey Office Milk Industries of Bottled and Canned Milk Sold in Sussex and Warren Counties in 1955."

No objection has been made to it yet. It was pending, for the tables. Is there any question as to the admissibility of the table?

(No response.)

Examiner HYDE: Exhibit No. 30-A is received in evidence for the table only.

* * * * *

EXHIBIT 30A

**Summary of Incomplete Survey by the New Jersey Office Milk Industry, of Bottled and Can Milk Sold in Hunterdon, Sussex and Warren Counties, 1955**

| Location of plants | Number of plants reporting | Percent sales in the 3 counties (4 mos) | Quarts sold in the three counties | | | |
|---|---|---|---|---|---|---|
| | | | March | May | August | October |
| Group A - plants inside H. S. & W. counties | | | | | | |
| 1. No other New Jersey sales | 10 | 84 | 159,168 | 165,276 | 174,160 | 174,858 |
| 2. Sell in other No. Jersey counties | 8 | 15 | 285,368 | 291,488 | 349,203 | 318,280 |
| Total Group A | 18 | | 444,536 | 456,764 | 523,363 | 493,138 |
| Group B - Outside H., S., & W. counties | | | | | | |
| 3. Other North Jersey counties | 10 | 3 | 301,718 | 330,065 | 506,065 | 341,340 |
| 4. Outside North New Jersey | 7 | 5 | 279,063 | 273,462 | 289,173 | 291,404 |
| Total Group B | 17 | | 580,781 | 603,527 | 795,238 | 632,744 |
| Total Groups A & B | 35 | | 1,025,317 | 1,060,291 | 1,318,601 | 1,125,882 |

PROMULGATION PROCEEDINGS

DR. DORRIS D. BROWN

1:30 P.M.

[12,744] AFTERNOON SESSION

Examiner HYDE: The hearing is in order.

Mr. Wiles.

Mr. WILES: I believe Dr. Brown was previously sworn as a witness in this proceeding.

Examiner HYDE: Yes, he was.

Mr. WILES: And I believe also that Dr. Brown's qualifications to testify as an expert witness have heretofore been entered into the record.

The WITNESS: That's right.

DR. DORRIS D. BROWN, was recalled as a witness and testified as follows:

DIRECT EXAMINATION.

By Mr. WILES:

Q. Dr. Brown, do you at this time have a statement that you would like to give——

A. Yes.

Q. —in support of the proposals generally outlined by Mr. Stanley Benham this morning?

A. That is right.

Q. Is this statement of yours in support of the proposals for a single order approach to the marketing problems before us, as outlined in Exhibit 177?

A. That is right.

Q. Dr. Brown, in this statement of yours, does it contain fundamental modifications to Order 27?

[12,745] A. Yes.

Q. These might be considered in further supplementation of the Order 27 modifications as first set forth in Exhibit 4-A by Mutual Federation, might they not?

A. Yes, sir.

Q. Would you proceed with your statement?

A. The statement I am making is in the capacity of representing all three of the groups that Mr. Benham spoke

for this morning, namely the Dairymen's League Cooperative Association, the Metropolitan Bargaining Agency and Mutual Federation of Independent Cooperatives, all qualified cooperatives under Order 27.

The program that I shall discuss is the details of a broad program that Mr. Benham outlined this morning; that program was worked out by producer leaders in this milkshed; among those producer leaders would be included Lloyd Wescott, Chairman of the New Jersey Governor's Committee, and Mark Robinson, Chairman of the Northeast Pennsylvania Governor's Committee.

In presenting this discussion I shall separate it into two parts: the first part deals with need for regulation of the Northern New Jersey area described in Exhibit 4-A, and the need for appropriate amendment to Order 27.

* * * * *

[12,748] The WITNESS: The second part of my discussion will deal with appropriate amendments to Order 27. These amendments will be appropriate modifications of Mutual's part of the hearing notice, as described in Exhibit 4-A, and this particular reference to that part of Mutual's sections dealing with Order 27.

I have two exhibits to present at this time. I believe they have both been distributed to interested parties in the room. The first exhibit consists of a series of 26 tables and five figures; the table on the cover is entitled "Table 1, health approved supplies of fluid milk by source for Northern New York Counties, 1955." They are all, all of the 26 tables and the five figures I have referred to are fastened together into one series.

Examiner HYDE: The document described by Dr. Brown is marked Exhibit 180 for identification.

(Thereupon, the document above-referred to was marked Exhibit No. 180 for identification.)

The WITNESS: The second exhibit that I presented is entitled "Classification by name of handler of pool plants under Federal Milk Orders 27, 61, and 110, and milk plants outside of Pennsylvania and New Jersey having respective Pennsylvania and New Jersey permits." It consists [12,749] of 22 pages.

Examiner HYDE: The document is marked Exhibit 181 for identification.

(Thereupon, the document above-referred to was marked Exhibit No. 181 for identification.)

The WITNESS: Starting now with the section of my discussion dealing with need for regulation of the Northern New Jersey Market, and need for appropriate amendments to Order 27, I would like to point out in this record, from data, contained in the exhibits entered by Dr. Pollard for the Market Administrator, the cost of production index has increased from 104 as the simple average for 1951 to 113 as the simple average for 1956.

Mr. WINTON: Could I have that re-read, I want to get those figures.

Examiner HYDE: The reporter will read it.

(Last sentence of the witness was read by the reporter.)

Mr. WINTON: Thank you.

The WITNESS: This particular cost of production index is one the Market Administrator is required to keep, under the terms of Order 27, and to make public to interested parties.

I would like to compare that index with the [12,750] change in the blend price under Order 27 for the same period of time. In 1951 the blend price was $4.57, as a simple average; it was $4.08 in 1956.

It is this increase in the cost of dairy farming, as measured by the cost of production index and the decline in producer prices, as indicated by this drop in the blend price, that is one of the major causes of unrest among

dairy farmers serving this milk shed. And it is one of the reasons for holding this hearing for obtaining the maximum improvement in producer prices that this hearing can yield to the orderly procedures involved in it.

The supply of milk for Northern New Jersey is from four major sources, on the basis of the method of pricing to producers. These sources are shown in Table 1 of Exhibit 180, entitled "Health approved supplies of fluid milk by source for Northern New Jersey consumers, 1955." This table indicates——

Mr. WILES: Off the record?

Examiner HYDE: Off the record.

(Discussion off the record.)

Examiner HYDE: On the record.

The WITNESS: This table indicates that the producers located in Northern New Jersey, with milk priced by the New Jersey Office of Milk Industry, supplied 465,734,000 [12,751] pounds to plants in 1955. Of this amount 212,034,000 pounds, or 46 per cent, was classified as Class I or fluid uses, by the OMI.

Mr. WINTON: Does that percentage appear——

The WITNESS: The percentage does not appear on the table.

These Northern New Jersey producers supplied about 17 per cent of the total fluid sales.

Producers living in New Jersey, New York and Pennsylvania, with milk priced directly by Order 27 at plants which also had the State of New Jersey health approval, delivered 2,193,194,000 pounds in 1955. Of this amount 366,961,000 pounds, or 17 per cent, was classified as I-C or fluid use in Northern New Jersey. These producers supplied 29 per cent of the total fluid sales of 1,282,155,000 pounds in the Northern New Jersey counties.

Mr. WINTON: Dr. Brown, are those figures which you just gave on this table, or are they some calculation from the table?

Mr. WILLIAMS: That was my observation, too, I don't know where he is compiling this from, it isn't in the table.

The WITNESS: If you will look at the column headed, "fluid sales in Northern New Jersey," you can add [12,752] the amounts shown for the categories I have described and obtain the figures I have just quoted to you. The data to obtain these figures are all given on this table.

* * * * *

[12,754] Mr. PELLEY: Does that last figure represent the three items, Order 27 plants in New Jersey, plus Order 27 plants in New York State, plus Order 27 plants in Pennsylvania?

The WITNESS: You are referring to the two billion pounds and the 366,000,000 pounds?

Mr. PELLEY: Yes.

The WITNESS: Yes, sir.

Mr. PELLEY: And that also represents the 29 per cent?

The WITNESS: Yes.

Mr. STECK: The 2,193,194,000 is the sum of what figures, Dr. Brown?

The WITNESS: It is the sum of the 372,758 pounds shown under producer receipts column, plus the 1,369,012,000 pounds shown there, plus the 451,424,000 figure shown there.

The next line I will discuss will be the line entitled "Order 61 plants." Producers living in southern [12,755] New Jersey, Delaware, Maryland and Pennsylvania, and with milk priced by Order 61, supplied an estimated 520,375,000 pounds to plants in 1955, and those producers and plants would be the only the Order 61 plants with New Jersey health approval. Of this amount, 10,200,000 pounds, or 2 per cent, was sold by Order 61 handlers as Class I, and distributed in bulk into Northern New Jersey, and a small additional quantity of packaged Class I sales from routes which were made by Order 61 handlers in the proposed area extension.

Classification rules in Order 27 and Order 61 would per-

mit some of this Order 61 supply to have been received from Order 27 handlers where it could have been classified either as I-B, I-C, or Class III, fluid cream and skimmed milk or concentrates.

Order 61 handler supplied less than one per cent of the total sales to consumers in Northern New Jersey in 1955.

I shall next discuss the remaining lines dealing with data from unregulated sources, producers supplying the Northern New Jersey market that are not regulated by any order, and living in the States of New York, Pennsylvania, Maryland and Delaware. These producers supplied an estimated 944,117,000 pounds from their plants in 1955. This figure is much smaller than total receipts [12,756] from producers at all plants in this group, because producer receipts data at seven plants in Maryland and Delaware were not available.

Of this 944,117,000 pounds, 692,960,000 pounds, or 73 per cent of producer receipts, were shipped to Northern New Jersey.

Mr. WINTON: Would you read that again.

Examiner HYDE: The reporter will read that last sentence, please.

(Last sentence of the witness was read by the reporter.)

The WITNESS: This was 54 percent of the total fluid sales to consumers.

Table 1 of Exhibit 180 further divides this total between the states, and in the case of Pennsylvania, between sections of the state.

Mr. POLIKOFF: When you said "unregulated" a minute ago, you meant unregulated by Federal Order?

The WITNESS: Yes.

Mr. WILES: Dr. Brown, it has been brought to my attention that on Table 1 of Exhibit 180, while the figures are correct, the footnote should be corrected in the record, one footnote. In the second column the first figure of 212 million, and so forth, having a small figure a, referring to

footnote a, that should be attached to the first [12,757] figure under the first column, "producer receipts," that figure being 465,734,000 pounds. The small a should follow that.

And then the small a, when you get into the footnote, should read, rather than Exhibit 112, "Table 3."

Examiner HYDE: Table what?

Mr. WILES: Rather than Exhibit 112, Table 6, it should read, "Exhibit 164, Table 2."

The WITNESS: I will make such corrections, and, with the Hearing Master's permission, physically make these corrections on the exhibit copies.

Mr. WINTON: Does that mean that the a is after the figure 212,034,000, and the present footnote a is eliminated?

Mr. WILES: It could be eliminated, and substitute the numbers that I put into the record.

Examiner HYDE: In the recess period will you make it your business to take this Exhibit 180 and make it correct?

Mr. WILES: Yes, I will.

Mr. WINTON: How about the second grouping of figures, the 286,121?

Mr. WILES: I have no further corrections to make at this time.

Examiner HYDE: Well, that new a will apply to the [12,758] new a that you set up; is that right?

Mr. WILES: Yes, as far as I know.

Mr. WINTON: But that will make a change in the 286,112.

Examiner HYDE: No, but he had a footnote there that he corrected.

Mr. WINTON: That doesn't seem logical.

Examiner HYDE: That's what he says.

Go ahead.

* * * * *

[12,760] The WITNESS: I am now ready to discuss Table 2 of Exhibit 180. Table 2 is entitled, "Sources of milk

used in Northern New Jersey, March, June, August and November 1955, and March, June, 1956."

This table contains data regarding the seasonal nature of certain supply sources. A study of these data for 1955 indicates that, No. 1, OMI regulated producers supplied 17.3 per cent of the total fluid sales in March; 11.7 per cent in June—I might comment that all of these figures I am giving are on the table.

Mr. STECK: Mr. Presiding Officer, when Dr. Brown [12,761] said that they supplied 17.3 per cent, did he mean that as actually supplied, or did he mean that the milk was classified that way?

The WITNESS: Actually classified that way.

Mr. STECK: That doesn't mean supplied.

Examiner HYDE: Well, you can argue that. He said it was classified that way.

The WITNESS: Let me go back and start again on this: OMI regulated producers supplied 17.3 per cent of the total fluid sales in March; 11.7 per cent in June; 13.9 per cent in August, and 15.1 per cent in November. The amount of this milk produced by OMI regulated producers within the proposed marketing area extension that got classified as fluid sales, Class I, by OMI, was 43.2 per cent in March, 30.1 per cent in June, 41.2 per cent in August, and 43.5 per cent in November.

Mr. WINTON: Pardon me, are these figures on the table? I can't locate them.

Examiner HYDE: The table consists, Mr. Winton, of more than one page.

Mr. WINTON: Well, are they on the table at all?

Examiner HYDE: I followed every one of them myself as he gave them from the table.

Off the record.

(Discussion off the record.)

[12,762] Examiner HYDE: Go ahead.

The WITNESS: Order 27 producers supplied 21.8 per cent of the total fluid sales in March——

Mr. POLIKOFF: Did you say 21.8?

The WITNESS: 21.8

Mr. POLIKOFF: Are you sure that's what you meant?

Mr. LENT: 6 and 4 and 10, and the adjustments.

The WITNESS: The figure I have just given you is the sum of 6.1 for order 27 producers living in New Jersey; 10.9 per cent for order 27 producers living in New York; and 4.8 per cent for order 27 producers living in Pennsylvania.

Mr. WILLIAMS: Might I make a suggestion: When you give a total that doesn't appear on the table, but is the composite of several figures here, you might indicate it to us, because we might find it. But we are not able to make the addition to identify the particular figure you are referring to.

Mr. LENT: Is this hearing for the purpose of doing all the adding for everybody?

Examiner HYDE: I think the suggestion is a good one. I grant you that you are not supposed to do it all, but I had to ask him myself where to find it, and I have got some sympathy for others who are seeking figures under [12,763] circumstances such as this. I think it is only a reasonable request that whoever is going to add up three figures just point them out, and we can save a lot of these interruptions, I am sure.

Mr. POLIKOFF: Can the last statements of Dr. Brown be read back, please?

Examiner HYDE: Read it back, please, Mr. Reporter.

(Last statement of the witness was read by the reporter.)

The WITNESS: The sums of similar figures for June would be 23.5 per cent, and in August 37.0 per cent, and in November 36.2 per cent.

Mr. WINTON: One second, I am trying to find those.

Mr. WILLIAMS: You see, Mr. Presiding Officer, there is not

only the problem of finding them, but then marking our tables and marking our notes after we make the additions.

Examiner HYDE: Yes, but you can find them. He has pointed it out to you now, he has told you how to put them together and given them to you by month.

Mr. WINTON: We are just trying to get them.

Mr. WILLIAMS: We are trying to get them down.

Examiner HYDE: And I know if he just takes his time again I am sure you can get them.

Mr. WINTON: The November total?

[12,764] The WITNESS: 36.2 per cent.

Mr. WINTON: What was the previous, August?

The WITNESS: 37.0 per cent for August.

The next paragraph: This data is not on the table.

Mr. WILLIAMS: What paragraph?

The WITNESS: That I am about to give you.

The data from Order 61 sources does not permit a monthly breakdown for the purposes of table 2 and this analysis. However, with only 10,200,000 pounds Class I sales from Order 61 into this area for the year, as compared with 1,282,155,000 pounds of total fluid sales in Northern New Jersey, it is doubtful if any Order 61 handlers and producers supplied as much as one-tenth of one per cent of the total fluid sales for any one month.

Order 61 sources supplied only .87 per cent of one per cent of the total annual fluid sales. The next set of figures that I shall give you will be the sum of the percentages shown in the second column for each month dealing with unregulated plants and other out-of-state——

Correction: the unregulated plants only in New York, in Pennsylvania, and in Pennsylvania the Allentown-Easton area.

Mr. STECK: What column is that?

Examiner HYDE: He told you, the second column. That's how he started out.

[12,765] The WITNESS: Producers selling to unregulated plants supplied 48.3 per cent of the total fluid sales in

March; 50.9 per cent in June; 34.9 per cent in August; and 38.3 per cent in November. These sales to Northern New Jersey represented 84.3 per cent to 96.1 per cent of producer receipts for unregulated supply sources in New York, with 100 per cent of producer receipts sold as fluid use in some markets somewhere each month.

* * * * *

[12,768] The WITNESS: We are still discussing table 2, the data for 1955 for the months of March, June, August and November. And I shall start with, at this time, the data with reference to the line entitled "unregulated plants in Pennsylvania, and also the Allentown-Easton areas."

The Pennsylvania unregulated plants, except in the [12,769] Allentown-Easton area, sold from 80.7 to 87.1 per cent of their producer receipts as fluid in Northern New Jersey, and 97.6 per cent to 99.7 per cent fluid use in some market somewhere each month.

The unregulated plants in the Allentown-Easton area of Pennsylvania supplied from 1.5 per cent to 2.6 per cent of the total fluid sales in Northern New Jersey. This was 9.8 to 17.6 per cent of total producer receipts at these plants where 65 to 80 per cent of producer receipts were used as fluid milk in some market somewhere each month.

The data in the line "other out-of-state" are a balancing figure, and include the unknown amount of milk from Maryland and Delaware, and packaged fluid sales from Order 61.

Fluid sales in Northern New Jersey averaged 106,846,250 pounds per month for the year and varied from 105.1 million pounds in January to 111.1 million pounds in October. Fluid sales varied less than 3 per cent from month to month, and can be considered as well as relatively stable. However, sources of supply and the percentage of supply utilized as fluid sales, that is, as Class I, varied greatly month by month.

The 1956 data shown on page 3 of table 2 in Exhibit 180

indicate that, No. 1, OMI regulated producers supplied 16.7 per cent of the total fluid sales in March, and [12,770] 14.7 per cent in June. The amount of this milk classified as fluid sales was 43.4 per cent in March, and 40.3 in June.

No. 2. Order 27 producers supplied 22.9 per cent of fluid sales in March, and 23.7 per cent in June.

No. 3. Order 61 data for March and June 1956 were not available.

No. 4. Producers selling to unregulated plants supplied 49.5 per cent of fluid sales in March, and 49.9 per cent in June.

These sales represented 93 per cent to 96 per cent of plant receipts from producers in New York, and 82.6 per cent to 86.1 per cent of producer receipts in Pennsylvania in plants other than in the Allentown-Easton area.

The heading entitled "Seasonality of supply sources." The seasonality of fluid sales from the principal sources of milk supply for Northeastern New Jersey varied greatly. This is shown for 1955 in Exhibit 180, entitled "Seasonal index of milk sales in Northern New Jersey, 1955." New Jersey OMI regulated grade B producer receipts used as Class I according to our calculations, is fairly even throughout the year, ranging from a low of 10.6 million pounds in May to a high of 15.2 million pounds in October. Compared to the annual average, the range is from 15.7 per [12,771] cent above in October to 19.1 per cent below in May.

The unregulated milk from New York State had a greater variation, from a high of 30.5 million pounds in May to a low of 17.4 million pounds in August, or from 28 percent above the annual average to 27 per cent below the annual average.

The Order 27 I-C sales in North Jersey had the greatest variation, from a low of 21.2 million pounds in May to a high of 40.6 million pounds in August, or from 30.5 per cent below the annual average to 33 per cent above the annual average.

The data in Exhibit 112 of this record show that the

seasonality of fluid milk sales from New York, unregulated, Jersey approved plants, also followed closely the seasonality of receipts, from producers at these plants.

The monthly percentages of producer receipts sold as fluid milk in North Jersey in 1955 from these plants varied only from 93 per cent to 97 per cent in January through July, 84 per cent to 93 per cent in July through December.

These data described above, in Table 1 of this exhibit 180, further show that, No. 1, less than half of the OMI regulated supply source in Northern New Jersey was classified as fluid use.

No. 2, order 27 supply sources were used to balance [12,772] fluid use requirements and to carry reserve supplies for this proposed extension to the Order 27 market area.

No. 3, Order 61 supply sources furnished less than one per cent of the fluid sales in the proposed area extension.

No. 4, unregulated supply sources, mainly in New York and Pennsylvania, compete for and obtain a higher share and volume of sales in this proposed marketing area extension during the flush spring months than in the short fall months. Figure 3 of Exhibit 180 illustrates the seasonal nature of supply sources serving this proposed area extension, and the use of Order 27 supplies for fluid sales and reserve supplies.

Since the unregulated New York and Pennsylvania supply sources are practically 100 per cent fluid sales for the four-months reported for in 1955 and two months in 1956, except for the Allentown-Easton, Pennsylvania plants, it can be further concluded that order 27 supply sources also carry the reserve supplies for the other markets served by these unregulated plants.

The Northern New Jersey market proposed for extension to the Order 27 marketing area is the major market served by these New York and Pennsylvania unregulated plants, except for some of the Allentown-Easton, Pennsylvania plants, which serve that market.

[12,773] A heading entitled "Trend in volume of supply for Northern New Jersey by source."

Mr. WINTON: Is that a heading of——

The WITNESS: It's a heading in the narrative. In Exhibit 180, table 4, "Northern New Jersey milk supply by known sources, 1951-1955," shows the changes in volume of producer receipts, except in the case of Order 27, I-C, and Order 61, class I, where the data are for fluid sales. These data show that from 1951 to 1955, milk production in Northern New Jersey increased 7.5 per cent, but the volume regulated by OMI dropped 20 per cent, while receipts at New Jersey Order 27 plants increase 88.7 per cent. Order 27 I-C milk as a source of fluid sales increased 59.9 per cent. Fluid sales from unregulated supply sources in New York and Pennsylvania increased 32.4 per cent, and 42.7 per cent, respectively.

Data of this type for Maryland, Delaware and Order 61 were not available.

Next there is a heading in the narrative entitled, "Plants approved by the New Jersey Department of Health as sources of fluid milk for Northern New Jersey consumers."

The New Jersey State Department of Health is responsible for health approvals of all fluid milk sources, farm and plant, consumed in the state. In 1955 the New Jersey Department of Health listed 243 New Jersey milk plants, [12,774] and 144 milk plants in New York, Pennsylvania, Maryland, and Delaware as approved sources of fluid milk supply.

In Exhibit 180, Table 5, "Plants approved by the New Jersey State Health Department 1955-1956 for shipment of fluid milk to New Jersey by states and regulations status," summarizes these data——

Mr. POLIKOFF: May I inquire whether the heading on Table 5 is incorrect? There it says "1956-1957," but I thought that in your testimony you said "1955-1956."

The WITNESS: I have misread my notes. The table is correct.

The correct years for the date would be '56-'57, and thank you, Mr. Polikoff, for calling that to my attention.

Mr. POLIKOFF: May I ask one more exploratory question?

Examiner HYDE: Yes.

Mr. POLIKOFF: If I heard you correctly, you said in your testimony "Approved by the Department of Health in 1955." But your table, you advised, is correctly headed with the years 1956-57. My question is: Did you mean that the approvals were given at some time during the year 1955 for the years 1956 and 1957?

The WITNESS: The data was obtained from the sources indicated at the bottom of Table 5, and with reference [12,775] to the New Jersey approvals the State Department of Health publishes a list of approved plants on a periodic basis, and they add to those lists. We have used the plants, the plant-approved list which they published during 1956, and it carries the heading, "1956-1957 approvals."

Mr. WINTON: Well, I think you would find that probably the permit year cuts across the calendar year.

I think it is probably July 1 to June 30, if I recall.

The WITNESS: I'm sure that is correct, yes.

Examiner HYDE: Go ahead.

The WITNESS: Of the 243 New Jersey Health-approved plants, 64 are located in southern New Jersey, and for the most part serve that area only. Of the 179 plants located in Northern New Jersey 17 are order 27 plants, and, as previously stated, receive 372.8 million pounds of the 838.5 million pounds 1955 Northern New Jersey production, most of which was shipped to New York City.

Of 144 out-of-state plants with health approval as sources of fluid milk, 67 are Order 27 plants and 28 are Order 61 plants. Three of the above Order 27 and Order 61 are sometimes Order 61 plants and at other times Order 27 plants.

Out-of-state health-approved plants are [12,776] concentrated in Pennsylvania, with 71, and New York, with 58; and with only 11 located in Maryland and four in Delaware.

Exhibit 181, entitled "Classification by name of handler, pool plants under Federal Order 27, 61 and 110, and milk plants outside of Pennsylvania and New Jersey having respective New Jersey and Pennsylvania permits," is a further guide to the New Jersey State Department of Health-approved supply source. This exhibit attempts to show the names of all handlers and the location of all plants associated by health approval with the Northern New Jersey and the Order 27 marketing area. It also shows handlers and plant locations for milk plants associated with Order 61 and Order 110, and the State of Pennsylvania health approval. It does not show historical performance for any of these plants.

Mr. POLIKOFF: May I ask a point of information on Exhibit 181?

Examiner HYDE: Yes.

Mr. POLIKOFF: The front page shows that it was prepared in February 1956, and I am just wondering whether that is the fact?

Mr. WILES: That front page is correct. 1956.

The WITNESS: Exhibit 59 is a map entitled——

Mr. WILES: Pardon me, that is correct, it should be '57. Will the record show that Mr. Polikoff is [12,777] correct, and it should be '57.

Examiner HYDE: The record will show that Mr. Polikoff is correct again, I will say. 1957.

The WITNESS: Exhibit 59 is a map entitled "Country plants in the New York Milkshed, June 1, 1955." While submitted in this hearing by others, it was prepared by a technical committee of the groups I represent. I had a part in its preparation.

I would like to explain this exhibit at this time, so that it can be considered along with the information just presented concerning milk plant health approvals of the New Jersey Department of Health. Exhibit 59 shows the location of all order 27 pool plants with New Jersey health approval, black dots with red squares; Order 27 plants

without approval, black dots; and unregulated milk plants in New York and Pennsylvania with New Jersey health approval as of June 1, 1955. This map does not show the location of Pennsylvania Order 61 milk plants, some of which have New Jersey approval. It does not show the Maryland and Delaware milk plants with the health approval.

Since June 1st, 1955 about eight of the milk plants shown on Exhibit 59 with New Jersey health approval no longer have such approval, while 16 milk plants, seven of which are shown on the map, have gained New Jersey health approval. [12,778] Figure 4, "Plants in the milkshed," of this exhibit 180 shows plant locations and type of approval for the Order 61 supply area. On this map the same symbols are used as for the map in Exhibit 59. In addition, milk plants under Order 61 are shown as green dots if they do not have New Jersey health approval, and as green dots surrounded by red squares if they do have New Jersey health approval.

The two maps, Exhibit 59, and Figure 4 of Exhibit 180, show the location and health approval of all plants as related to the present Order 27 marketing area and the proposed Northern New Jersey extension.

It is apparent from a cursory glance at these maps that there is extensive overlapping of and intermingling of plants and producers supplying Northern New Jersey and New York City. The maps also show extensive overlapping of both Order 27 plants and New Jersey approved plants, with the direct delivery supply areas of the principal upstate New York markets, which have been considered in this hearing for addition to the Order 27 marketing area. All those plants approved for the Northern New Jersey market are within 15 miles of one or more Order 27 plants with the exception of two plants in Allentown, Pennsylvania, one in Myersdale, Pennsylvania, and the plants in Maryland and Delaware. The Maryland, Delaware and Allentown-Easton, [12,779] Pennsylvania, milk supplies ap-

proved for New Jersey have been shown previously in this statement to be a very minor part of the Northern New Jersey milk supply.

The 15-mile radius as a measure of overlapping and intermingling is based on observation of location of supplies for individual plants, thus: In an area within a 15-mile radius of a plant, which overlaps the 15-mile radius of another plant, is likely to be producers close to each other in the overlapping territory, some of whom ship to one plant and some to the other. In the case of all out-of-state plants supplying Northern New Jersey, and also in the case of at least 90 per cent of all producers located in Northern New Jersey, the proximity to Order 27 supplies is at least this close, and for most producers much closer.

In many cases the distance to an Order 27 plant is less than 15 miles. Also in many cases there are several Order 27 plants within the 15-mile radius.

In some cases there are New Jersey plants and Order 27 plants in the same town.

Some examples of the proximity of New Jersey unregulated plants to Order 27 plants, are the following: South Kortright, New York, in Delaware County, is within 15 miles of at least nine Order 27 plants.

The Sherburne Four Corners plant in New York is [12,780] within 15 miles of five Order 27 plants.

The Canton and Great Bend plants in Pennsylvania are within 15 miles of four Order 27 plants.

The Homer and Cortland, New York plants in Cortland County are within 15 miles of seven and 13 Order 27 plants, respectively.

Some other plants within 15 miles of at least two Order 27 plants are Windham, North Bleinheim, Langdon and Deposit in New York State; and Meshoppen, East Smithfield, Wysox and Lookout in Pennsylvania.

The extent of intermingling in Northern New Jersey has been increasing rapidly and steadily since 1949. Seventeen Order 27 plants in Northern New Jersey in August

1955 were plants which had shifted from OMI regulation to Order 27 since 1950.

In Exhibit 180, Table 6——

• • • • •

[12,785] It is our belief that classifications in New Jersey as practiced by OMI since 1937 are for all practical purposes identical with classifications that are now existent under Order 27. Class I in New Jersey is similar to Class I-A in New York, except for the flavored drinks and creamed buttermilk that might test under three per cent or over five per cent butterfat.

Such products under Order 27 would have been classified as Class III. These products are minor volume items in the market, and constitute the minor difference in classification in Northern New Jersey as compared with Order 27.

OMI has had fluid cream, sweet or sour, classified as a special class from the beginning. It is a special class under Order 27. All other New Jersey products used were classified as Class III or II-A. This is similar to Order 27, where Class III includes all other uses, other than fluid sales in Class I and fluid cream in the marketing area.

The extension of the Order 27 marketing area and [12,786] the continuation of these same classifications as now in Order 27 should not place any hardship on any handler with reference to this particular item.

Under this classification system sales of fluid milk in Northern New Jersey totaled 1,282,151,000 pounds in 1955, according to "Table 2, State of New Jersey, Department of Agriculture, Trenton, Office of Milk Industry, Sales Analysis by Months," a monthly tabulation of the New Jersey milk situation published by OMI. The volume of Class I sales as reported by the Office of Milk Industry since 1940 is shown in Table 7, Northern New Jersey fluid milk sales, 1940-1955, in Exhibit 180. These data show a steady increase in Class I or fluid milk utilization in Northern New Jersey since 1940, except for a slight decline from 1946 to

1948. The total increase since 1940 is 60.2 per cent in volume of sales as recorded here.

Next is a heading, "Relation between supply and demand." It is impossible from the available data to show the exact proportion of the total Northern New Jersey milk supply which is sold for fluid milks, except on the basis of several arbitrary assumptions, for the reason that there is no recognized precise measure of total supply. Part of the fluid milk sold is from a supply regulated by the State of New Jersey; part is from Order 27; part from [12,787] Order 61; and part from unregulated out-of-state supplies. However, the relationship between supply and demand can be shown for most of the different types of supply.

Examiner HYDE: At this point we will have our regular afternoon recess.

(Recess had.)

Examiner HYDE: The hearing is in order.

Proceed, Dr. Brown.

Mr. PELLEY: Mr. Hearing Officer, there was a point on Table 7. I checked with Dr. Brown; I don't know whether he has got the record, but the table refers to thousands of pounds, rather than pounds.

The WITNESS: That is correct, Mr. Pelley. Each of the numbers shown in the pounds column should have 3 zero's following it.

Mr. WINTON: Or you could just change the heading.

The WITNESS: Or you could change the heading to include thousands of pounds—either way.

The next heading I have in my statement: "OMI reported utilization of all Northern New Jersey milk." The New Jersey Office of Milk Industry in its "Table i, State of New Jersey Department of Agriculture, Trenton, Office of Milk Industry, summary of the production of milk in New Jersey as reported by dealers and producer-dealers," published monthly, shows percentage breakdowns [12,788]

among Class I, Class II, and Class II-A for all milk received directly from producers at plants in Northern New Jersey. Our analysis of this tabulation shows a declining proportion of all New Jersey producer receipts classified as Class I milk from 1948 to 1950; an increase in 1951; and a steady decline from 1951 to 1955, as follows: —and I want to read some data into the record, in order to set it up in one column by years, and the next column to be headed "Per cent Northern New Jersey Producer Receipts Sold as Class I;" I shall start with 1948, and read through 1955.——

| Years | Per Cent Northern New Jersey Producer Receipts Sold as Class I |
|---|---|
| 1948 | 97.7 per cent |
| 1949 | 78.2 per cent |
| 1950 | 76.1 per cent |
| 1951 | 83.0 per cent |
| 1952 | 80.2 per cent |
| 1953 | 76.4 per cent |
| 1954 | 72.9 per cent |
| 1955 | 70.6 per cent |

The proportion of this milk reported by OMI in Class II has increased from 19 per cent in 1953 to 22 per cent in 1954 and 25 per cent in 1955.

The proportion reported in Class II-A has [12,789] remained fairly constant during the past three years, at three to four per cent of producer receipts.

The next heading is "calculated utilization of OMI only milk." The total volume of milk in the classification shown in this table 1 monthly tabulation of OMI includes the milk received from producers at Order 27 plants in New Jersey. The annual statistics issues of the Order 27 Market Administrator's bulletins, Exhibits 13 and 14 in this record, show by months and by states receipts of milk at Order 27 plants [12,790] and the use of this milk as shipments of fluid milk to the marketing area, shipments of fluid milk to other areas, and milk equivalent of shipments in the form of fluid cream to the marketing area. The percentage classification of OMI only milk produced in Northern New Jersey can be determined by subtracting

from class utilization figures shown in the monthly OMI Table 1 tabulation for Grade B North Jersey milk, the classification of Order 27 milk being included therein.

In this Exhibit 180, Table 8, "Calculation of classification of North New Jersey milk, Grade B, after eliminating utilization of Order 27 milk at New Jersey plants by months, 1954," shows the classification of OMI Grade B milk for this year. In this calculation we have subtracted the shipments of Order 27 New Jersey milk for fluid use from Class I; the Order 27 Class II use from Class II; and the Order 27 Class III use from Class II-A.

In a few individual months there was not enough Class II-A to absorb all the Class III use of New Jersey Order 27 milk. In such cases the balance was subtracted from Class II under OMI.

Column 9, Class I, Column 12, Class II, and Column 15, Class II-A in table 8, Exhibit 180, show the pounds and classifications of classification of OMI regulated milk only as produced in New Jersey and priced by OMI.

[12,791] Columns 16, 17 and 18 of this table show Columns 9, 12, and 15 converted to percentages of the total amount of milk priced by OMI in Class I, Class II, and Class II-A.

The percentage of Class I OMI milk calculated by this method for each month of the years 1948-1955 are shown in Table 9 of Exhibit 180. In this Exhibit 180, Table 9, comparison of percentage of Class I utilization of all northern New Jersey Grade B milk as reported by OMI with milk remaining after Order 27 milk at New Jersey plants by months, 1948-1955, shows the results of a similar calculation as that explained and illustrated in Table 8. In this Table 9, the column for each year entitled OMI Milk Only is the per cent Class I utilization of OMI regulated northern New Jersey producers. It would be comparable with Column 16 of the previous Table 8 for each year.

The data in this Table 9 indicate that the percentage Class I utilization of OMI only regulated milk in New Jersey

has steadily dropped from 97.7 per cent Class I in 1948, to 43.9 per cent Class I in 1955.

Available data not summarized here indicate utilization for the first ten months of 1956 was below the first ten months in 1955.

Class I utilization of OMI regulated milk only has dropped much faster than Class I utilization of all north New Jersey milk supplies.

[12,792] The Order 27 milk obtained from this same northern New Jersey area shows a Class I utilization of 94.2 per cent to 99.3 per cent for the 1948-1955 period of time.

The utilization of OMI only regulated milk in 1955 was below the entire Order 27 pool average for that same year.

These data shown in Tables 8 and 9 of this Exhibit 180 indicate that state regulatory practices in northern New Jersey and marketing conditions in northern New Jersey have not permitted full utilization of New Jersey produced milk in line with expectations for this area. State regulation has not been able to maintain or to obtain full and orderly utilization of nearby producer milk in line with good marketing practices and in line with conditions under Order 27.

My next heading is Class I-C milk.

Class I-C sales in northern New Jersey have been as shown in Table 10 of Exhibit 180. This table would indicate that Class I-C sales relative to total sales in the proposed extended marketing area were relatively high from 1940 through 1946, and declined to a low in 1949. Since 1949 the north Jersey volume of I-C sales has increased 133 per cent.

Exhibit 168 of this record contains a list of [12,793] Order 27 plants with a long historical relationship with the proposed northern New Jersey extension of the marketing area and should be considered along with this table.

In comparing this table with Table 7 of Exhibit 180, I would like to point out that the per cent of total sales of I-C milk as a source of fluid sales in North Jersey ranged

from 22 to 27 per cent of fluid sales in 1940 through 1943, and declined after 1943 to 14 per cent of fluid sales in 1949. Since 1949, I-C sales have increased up to 1955, when they were 28.6 per cent of total fluid sales in the north Jersey area.

[12,794] There has been a further percentage increase in the proportion of I-C sales to total fluid sales in 1956.

In November 1955 Class I-C sales were 45 per cent of total fluid sales in the northern New Jersey area under consideration. In the first six months of 1956, Class I-C sales from Order 27 pool plants into the proposed extended area increased 5.3 per cent over the first six months of 1955. The percentage increase for the last six months of 1956 is not available.

General market conditions and knowledge of the market would indicate that this increase has been greater than the first six months 5 per cent rate for the last half of 1956.

This use of Order 27 supplies to furnish a major part of utilization as Class I during the fall months, and to carry reserve supplies during all months of the year, is one of the principles that ties the proposed northern New Jersey counties into Order 27. The Order 27 marketing area regulates it under a single order.

The next heading I have is: "The Prices Paid Producers." Tables 11 through 15-C of Exhibit 180 are tabulations of various prices paid producers selling their milk to Order 27 plants to OMI regulated plants and to unregulated plants.

The unregulated plant data were not available for [12,795] the long period of years for which the Order 27 and OMI and OMI data are presented. Table 11 of Exhibit 180 compares Order 27 prices at the 201-210 mile zone with prices paid to farmers shipping to New York non-Order 27 plants approved for New Jersey. These price data are for 3.5 per cent milk by months for 1954. They show that the New York unregulated plants selling milk in New Jersey received a weighted average price of $3.98 in 1954,

while Order 27 producers received $3.92 as a weighted average for that year.

Mr. DANIELS: Mr. Hearing Officers, Dr. Brown is referring to Table 11, Column 1. I wonder if he inadvertantly used the terminology "New York plants selling milk in New Jersey." The table is captioned "New York Unregulated Plants approved for New Jersey." In your testimony you said "selling" when you were referring to that caption. I just wanted to know whether you meant that.

The WITNESS: There is that technical difference in the language. The exhibit Kling in this record, from which this data was obtained, points out the volume of producer receipts at the New York plants, the volume of those receipts sold in New Jersey. As I recall the figures—we have them in Table 1 for 1955. They exceed 90 per cent for the year.

Mr. DANIELS: I know you are not being cross-examined now. All I wanted to know is whether or not you want [12,796] the narrative part of your testimony to read "the prices paid at New York unregulated plants with New Jersey approval"; or do you want your testimony to read as you stated it "prices at New York unregulated plants for milk sold in northern New Jersey?

The WITNESS: The testimony reads "prices at New York unregulated plants selling milk in New Jersey."

Mr. DANIELS: All right; we will question you about it later, if that is the way you want it to read.

The WITNESS: This data is not adjusted for location or premiums paid at Order 27 plants, if any. Thus, New York producers delivering to non-Order 27 plants with New Jersey approval receive 5.6 cents more for their milk without the above adjustments than did Order 27 producers for this year.

Similar data for price differences in 1955 can be obtained from Exhibit 107 in this record. It shows minor differences in most of the up-state New York areas where

there are unregulated plants when compared with Order 27 neighboring plants.

The conclusion is that there are no significant price differences between Order 27 plants and unregulated producer prices supplying the New Jersey approved plants and the New York market. For all practical purposes, producers at regulated and unregulated plants received the same price.

[12,797] Similar data for the non-order 27 plants approved for the New Jersey market, and located in Pennsylvania, Maryland and Delaware, were not available.

The classification for fluid milk of standard quality in the state of New Jersey under OMI is Grade B. This milk is considered comparable with Class I-A milk established under Order 27. A study of producer prices for OMI and Order 27 milk in New Jersey should be helpful.

In making this study, we have adjusted the Order 27 Class I-A, 201-210 mile price to the 51-70 mile zone by adding 10 cents for the transportation differential in this zone, and 20 cents for the location differential in this zone. The Order 27 prices are for 3.5 per cent milk f.o.b. the New Jersey country plants, whereas the OMI prices, in most cases, are f.o.b. the New Jersey pasteurizing and bottling plants.

Table 12 of Exhibit 180 shows the comparison of Order 27 I-A prices for the 51-70 mile zone, with New Jersey Grade B prices 1942 to 1956. The average for this entire period of time is $5.04 for New Jersey Grade B milk and $5.11 or 7 cents more for Class I-A milk under Order 27 in this region. Order 27 Class I-A prices——

Mr. PELLEY: I should like a clarification of that table, Column 2. Is that the blend price or the price received by producers for Grade B milk in New Jersey? [12,798] Just what is that price there?

The WITNESS: That is the Grade B price, not the blend price. I have the blend data in another table. And, it is also Class I Grade B.

Mr. DANIELS: Is that what you want to say?

The WITNESS: Class I New Jersey Grade B, would be a clearer heading for the column. That is in Table 12. It is now defined as "New Jersey Grade B price."

Mr. WINTON: That last figure, Dr. Brown, for the year 1956, should be corrected, shouldn't it?

The WITNESS: Yes, I want to correct that. Since you have brought it up, let me do it at this time.

In Table 12 of Exhibit 180, for the year 1956, in the third column to the right, the column reading "excess of New York price over New Jersey Grade B," the ".06" should have a minus sign in front of it.

Order 27 Class I-A prices exceeded New Jersey Grade B Class I prices for nine of the thirteen years, while New Jersey Grade B Class I prices exceeded Order 27 prices four of the thirteen years.

Mr. LENT: That is now eight and five.

The WITNESS: In Exhibit 180, Table 13, a comparison of Order 27 Class II and Class III prices on the 51-70 mile zone, with New Jersey Class II and Class II-A prices, 3.5 butterfat, 1949-1955 shows the fluid cream and [12,799] dairy product price relationships between these two segments of the market for the time indicated. Class II fluid cream in New Jersey has been priced lower than Class II fluid cream under Order 27. Class III Order 27 prices have been higher than Class II-A prices under OMI. Fluid cream shipped from an Order 27 plant to New Jersey has been priced under Order 27 at the Class III price.

This data would indicate that Class III Order 27 prices for fluid cream in New Jersey are similar to fluid cream prices received by New Jersey producers in recent years.

Table 14 of Exhibit 180 compares Order 27 uniform prices at the 51-70 mile zone with Northern New Jersey blend prices at the 51-70 mile zone, 1942 to 1956. In this Table the Northern New Jersey blend price for the 13 years averaged $4.72. During this same period of time, the uniform price under Order 27 at the 51-70 mile zone f.o.b. country

plant in Northern New Jersey averaged $4.34, or 38 cents below the average Northern New Jersey blend price f.o.b. the pasteurizing and bottling plant for Grade B milk in this part of New Jersey.

The Order 27 data in this Table 14 does not include premiums paid by Order 27 handlers in New Jersey. These premiums averaged about 35 cents in 1955 and 1956 (see Exhibit 167 in this record).

[12,800] Table 8 of this Exhibit 180 is a calculation of the percentage of OMI priced milk that was classified as Class I, Class II and Class II-A in 1954 by the residual classification method. The classification for OMI only milk represent the amount of milk remaining and classified as indicated, after subtracting the Order 27 utilization of New Jersey produced milk.

Columns 16, 17 and 18 of this Table 8 show the percentage of the total amount of Northern New Jersey milk priced by OMI in each classification. By multiplying the percentage in each classification as shown in columns 16, 17 and 18 of Table 8 by the respective OMI minimum class prices, one is able to determine the blend price paid OMI producers for each of the months in 1954.

Mr. WINTON: Dr. Brown, could you clarify what you mean by the New Jersey or OMI blend price?

The WITNESS: That I am discussing now?

Mr. WINTON: Yes.

The WITNESS: I am explaining a method used to determine the OMI blend price by first determining the classification of OMI milk, the percent in each classification. And the method used there was to subtract out the known classification of Order 27 New Jersey receipts. Now, I am multiplying those percentage classification results for OMI only milk by the respective class price to determine the ac-

[12,801] tual blend price those classifications would yield.

Mr. WINTON: That is not any figure published by OMI but, rather, a computed figure which it attempts to take all the OMI utilization and average out the OMI prices?

The WITNESS: That is correct. It takes the OMI reported utilizations and the OMI reported class prices and the Order 27 similar data for this group of producers in Northern New Jersey, which is reported in one body of data. I am now separating the data between the two parts.

Mr. WINTON: You are trying to find out on that basis an average price paid for all the OMI regulated milk?

The WITNESS: Yes.

Mr. DANIELS: Who made the computation?

The WITNESS: The computations were made in my office.

Mr. DANIELS: Under your supervision?

The WITNESS: Yes, sir.

Mr. WINTON: These refer to Grade B milk?

The WITNESS: Yes.

Mr. WINTON: Exclusive of Grade A?

The WITNESS: Yes.

In Exhibit 180, Table 15, New Jersey OMI producer blend prices calculated by weighting OMI minimum class prices by percentage of OMI only milk in each class resulting from elimination of Order 27 Northern New Jersey milk by the classi- [12,802] fication method by months 1954 shows the data used and the resulting prices determined by this method. In this Table 15 the figure $4.85 shown in column 7 for the month of January 1954 was obtained by multiplying $5.87, the OMI Class I price, times 61.34 percent, plus $3.28, the OMI Class II price, times 35.73 percent, the OMI Class II utilization, plus $2.64, the OMI Class II-A price, times the 2.93 percent of OMI priced milk only utilized in this classification.

The figures shown in column 7 represent the OMI only producer blend price for each month in 1954 calculated according to this method.

Mr. DANIELS: By whom?

The WITNESS: The Table shows that it was compiled by Mutual Federation of Independent Cooperatives.

Mr. DANIELS: Compiled?

The WITNESS: And calculated.

Mr. DANIELS: It may not be calculated by OMI. Who calculated it?

The WITNESS: We have.

Mr. DANIELS: Mutual?

The WITNESS: Yes, sir.

Mr. DANIELS: Under Dr. Brown's direction?

The WITNESS: Yes, sir.

There is a second method of determining the blend price paid North New Jersey producers regulated by OMI only. [12,803] This method would be to subtract from the OMI reported values for New Jersey milk in their monthly table 1 tabulation the known value of Order 27 New Jersey produced milk plus its premiums, and thus determine the residual value of OMI-priced milk.

Table 15-A of this Exhibit 180 is such a calculation of OMI Table 1 data for the year 1954.

There are a number of typographical errors in the headings of this Table which I would like to indicate at this time. In the column shown as column 5, you will note the captions "column 4 times 5", and that caption should be column 3 times 4.

Mr. DANIELS: Were these calculations made by Mutual under the direction of Dr. Brown?

Mr. DURBIN: I object. There should be no cross-examination until he finishes.

Mr. DANIELS: I am not cross-examining.

Mr. DURBIN: That goes to the admissibility of the Exhibit.

Mr. DANIELS: If he doesn't want to explain it, I don't care. I just thought it would be nice for him to explain.

Mr. LENT: On the next page of this table——

Mr. DANIELS: I withdraw it.

Mr. LENT: Let's get this settled for the future. [12,804] On the next page of this Table, at the end, it says "compiled by Mutual". I think, in view of previous colloquy between the witness and Col. Daniels, it may safely be said that "compiled" and "computed"——

Mr. DANIELS: I will be glad to hear him say that.

Mr. LENT: It says that on the paper.

Mr. DANIELS: No, it doesn't. It says "compiled."

Mr. LENT: You just got through having him say that "compiled" and "computed" meant the same thing.

Mr. DANIELS: As to one table. Is that true in every case?

Mr. LENT: Do we have to go through that every time?

Examiner HYDE: Do you want to ask him any questions?

Mr. DANIELS: Where we see the word "compiled" does that mean also "calculated or compiled by"——

The WITNESS: Let me make a statement for all of these tables in Exhibit 180, and all the figures in Exhibit 180, which will clear your mind on this problem.

Mr. DANIELS: Thank you.

The WITNESS: They were all calculated by me or under my supervision.

Mr. WILES: Except where reference is made to official statistics.

The WITNESS: The sources of the data are indicated [12,805] in each table. But, so far as any calculations, any tabulations, any compilations that you might want to make of these tables, they were all either done by me personally or under my supervision.

Examiner HYDE: Proceed.

The WITNESS: I was explaining some corrections in the headings in Table 15-A. The second correction would be in column 6, the line that reads "column 2 minus 4" should be "column 1 minus 3".

On the second page of Table 15-A, column 7, the line in the heading that contains the figure "2" the correct figure is "2".

Mr. WINTON: How would it read then?

The WITNESS: It should read "column 2 minus 5".

In column 8, the words in the parenthesis, "8 minus 7" should read "column 7 minus 6—rather, divided by 6".

Mr. WINTON: Would you restate that?

The WITNESS: The words in the parenthesis that read "column 8 divided by column 7" should read "column 7 divided by 6".

And then, in columns 9, 10 and 11, I would like to add the heading above the words "percentage classification"—I would like to add the words "OMI milk only".

Then, in the fourth line from the bottom of the [12,806] second page of Table 15-A, in the parenthesis that now reads "Class I-A price", strike the letter "A".

The residual value blend price of OMI only milk as determined by this method is shown in column 8 of this Table 15-A. Columns 9, 10 and 11 show the percentage classification in Class I, Class II and Class II-A of OMI regulated milk necessary to support the residual value blend price obtained by this method. These necessary percentage classifications are above those reported by OMI in their Table I for all of the North Jersey produced milk for each month of 1954

In Exhibit 180, Table 15-B, a summary of Class I percentage utilization for North Jersey Grade B milk as calculated by various methods by months 1954, shows that the actual utilization of OMI priced milk as Class I would be as indicated in column 3. If the data for Class I utilization as reported in columns 1 and 2 are correct, the data in column 2 is that for Order 27, and are from the Market Administrator's reports. The data in column 1 are from the records of the Office of Milk Industry. However, the classification percentages indicated in column 4 would be that necessary to support the price payment values reported in OMI monthly tabulations which we know as Table I.

A similar analysis of OMI 1955 data reported in their OMI monthly table 1 publication shows 70.6 percent [12,807] for column 1, 43.9 percent for column 3, and 78 percent for column 4, if the analysis were made similar to that of Table 15-B. Thus, the lack of reconciliation of classification data is greater in 1955 than in 1954.

Table 15-C of this Exhibit 180 summarizes the blend price calculations by various methods I have applied to OMI Table 1 data. In this Table 15-C, column 1 contains the data as reported by OMI. Column 2 shows the prices paid to New Jersey Order 27 producers, plus premiums. Column 3 represents the price received by New Jersey producers if the OMI utilization data as reported in their Table 1 are correct. Column 4 represents the price received by OMI regulated producers if the OMI Table 1 value data are correct.

The simple average difference between column 3 and column 4 is 78 cents. The similar calculation for 1955 would yield——

Mr. WIXTON: In Table 15-C there is a footnote in the third column with the heading; is that supposed to be "a" or "b"? You notice there are two footnotes "a" and no footnote "b".

The WITNESS: The footnote that is at the top of the heading for column 3 should be stricken. Thank you for calling that to my attention.

Mr. WIXTON: Will you make that clear on the record? [12,808] The WITNESS: That should be—column 3, the footnote there should be "b".

A similar calculation of 1955 OMI data would yield a price for column 3 of Table 15-C of $4.15, and a price that would be comparable with column 4 of Table 15-C of $5.04, or a difference of 89 cents.

Table 15 through 15-C illustrate that data with reference to utilization of OMI regulated New Jersey producers and prices paid OMI regulated producers are not reconcilable one with the other. Either the utilization data are incorrectly reported, or the price data are incorrectly reported, or both are incorrectly reported by OMI in its monthly Table 1 tabulation.

Further, the application of the analysis illustrated here in Tables 8, 9, 14, 15, 15-A, 15-B and 15-C when applied in a similar fashion to all of the data given in Table 8 would

indicate that utilization and prices paid producers in the OMI Table 1 monthly tabulation have not been reconcilable since early 1949, and that the area of differences has grown in magnitude each year since 1949.

It is our assumption that neither the calculated prices nor the calculated utilizations for OMI regulated milk only accurately reflects actual marketing conditions in Northern New Jersey; rather, a price somewhere between the extremes of $4.42 and $5.20 shown for 1954 in Table 15-C seem [12,809] best to coincide with field observations of trade conditions in this area. The $4.42 and the $5.20 prices average $4.81. This is 9 cents above the price received by New Jersey Order 27 producers f.o.b. country plants.

A compilation of prices reported to have been paid by the larger New Jersey Order 27 plants and competing prices paid by OMI regulated plants made for this same period of 1954 shows a 7 cent price advantage to the OMI regulated producers.

It is our conclusion that for all practical purposes OMI regulated producers and Order 27 regulated producers living within Northern New Jersey have received the same price for their milk for the last several years. Competitive conditions between Order 27 New Jersey plants and OMI regulated New Jersey plants have kept local prices in this area at approximately the same level as Order 27 prices plus premiums.

We have previously indicated that about 21,496 producers were approved by the Northern New Jersey Health authorities to supply this market. Over 8000 of the number were shipping to plants regulated by Order 27. This group of producers received a price for their milk as determined by Order 27. This means that neighboring Order 27 producers in the same location received the same price for milk with the same butterfat test.

[12,810] About 4,470 producers were located in Pennsylvania and New York State and delivered their milk to plants not regulated by Order 27; but intermingled with Order 27

plants. Data in this record indicate that it is the general practice for these plant handlers to price milk to their producers at approximately the New York Order blend prices.

It is our observation and conclusion that both regulated and unregulated producers in this common production area have the same price making forces and do, in fact, receive the same prices for their milk; thus the marketing area now described under Order 27 and the proposed extension in Northern New Jersey constitute a single supply market and should be regulated under a single order, if the maximum benefits of regulation are to accrue to producers.

The next heading is "Minor Factors in the Market". An estimated 77 producers living in Northern New Jersey were producer distributors or distributors with own herds in 1956. These producer distributors and milk from herds of distributors are not priced under Order 27 or under the Office of Milk Industry regulations at this time. They are producers who process their own milk and distribute their own milk. They may or may not buy milk supplies from other producers. This type of producer is usually exempt from Federal regulation so long as the producer distributor produces his entire supply or the major part of his supply and is a family farm type of [12,811] operation.

In October, 1956 about 177 Northern New Jersey producers were listed by OMI as Grade A producers for the Northern New Jersey area and presumably received a premium for their milk because of its color, higher test, low bacteria count, evenness of seasonal supply and closeness to the market. The volume of milk is small in comparison with the entire market. There is no reason why producers with milk of these characteristics would not, could not and should not continue to receive premiums from their handler under any kind of a Federal or State milk marketing regulation.

These special values of milk are usually not provided

for in Federal milk regulations; but, nevertheless, not prohibited.

The pricing for these special values, other than evenness of production, butterfat and perhaps location are usually worked out by the dealer and his producer and represent premiums above the minimum price provided for in the Order. The unregulated producer that has been receiving this kind of premium is likely to continue to receive it for the metropolitan area. Likewise, there are producers under Order 27 that receive a premium for their milk from their dealer because of its color, higher test, low bacteria count, evenness of seasonal supply and closeness to the market. We do not have data to show whether this premium paid Order 27 [12,812] producers is similar to or different from the rate of premium received by a New Jersey producer of this special milk. We are assuming that the value for these characteristics of a special milk supply is very similar as among producers in or out of the Order 27 pool.

The next heading is "Trends in Milk Production with Shifts in Supplies Among Markets, New York Milk Shed and Vicinity, 1940-1955." This statement has shown thus far that the New Jersey milk supply is almost completely intermingled with the Order 27 milk supply and that a growing proportion of the fluid milk requirement of North Jersey is supplied from Order 27 plants in a manner which results in the Order 27 pool producers carrying the reserve and surplus burden for the North Jersey unregulated segment of the market without sharing in the pricing of Class I milk in this segment of the market; and in Class I utilization, because of this unique relationship, shifts in milk supplies in and out of the Order 27 pool during the past several years is significant to the question of marketing area extension and amendment to Order 27.

During the first year or two of the operation of Order 27, there was a sizable surplus of milk in the pool. In November, 1940, total pool supply was 378.3 million pounds, and Class I-A sales were 204.7 million pounds, or 54.1 per cent

Class I-A utilization. This heavy reserve [12,813] supply disappeared soon after the United States became involved in World War II. Pool supplies of milk had increased 6 percent from 1940 to 1942, but declined 10 percent from 1942 to 1944. 1945 showed an increase of about 5 percent, but it was not until 1949 that the pool supply climbed again to a level above 1940. The 9 year period 1940-1948 was a period of fairly even milk supply in the Order 27 pool. It never was more than 6 percent above nor 7 percent below 1940 in any of these years.

Milk sales climbed steadily during World War II period, reaching a peak of 262.8 million pounds of Class I-A in November, 1946 and then declining moderately in 1947, 1948 and 1949. There was 66.7 per cent of Class I-A sales in the pool in November, 1948 in contrast with 54.1 per cent in November of 1940.

From 1942 through 1948 the supply-demand situation was a case of increasing demand both within and outside the Order 27 marketing area with an even stable supply. In the face of increasing outside demand, plants were being withdrawn from the pool to serve other deficit milk areas, including Northern New Jersey.

Beginning with 1949, however the milk supply-demand conditions changed substantially from a tight situation bordering on shortage to a surplus condition, both within and outside the Order 27 market, which has become of greater and [12,814] greater magnitude in succeeding years through 1955. From 1948 to 1955, the Order 27 milk supply increased every year with 1955 being 46 percent above 1948. Class I-A sales in 1955 were only 5.6 percent above 1948. Compared to an increase of 46 percent in the Order 27 pool supply from 1948 to 1955, milk production in the 6 State area from which the Order 27 pool draws its supply: New York, Pennsylvania, Vermont, New Jersey, Massachusetts and Connecticut, increased only 18 percent. New York State was up 22 percent; Pennsylvania was up 16 percent; Vermont was up 19 percent; two other States supplying New

Jersey, Maryland and Delaware, were up 28 and 14 percent respectively. New Jersey was up 10 percent.

These data are shown in Exhibit 180 in Table 16, milk production in selected states and U. S. compared with producer receipts under New York Milk Order 27, Philadelphia Milk Order 61 and Northern New Jersey, 1948-1955.

These data show that the Order 27 pool thus increased more than twice as fast as milk production by States in the milk shed from 1948 to 1955. The following analysis attempts to trace movements in milk supplies by counties and 20 mile zones. The heading "Trends in Milk Supply by Counties".

In Exhibit 180, Table 17, "Annual Receipts from Producers by Counties, Order 27, 1940-1955" shows the milk supply in the Order 27 pool by counties by years from 1940 [12,815] through 1955. Table 18 of Exhibit 180 shows these data converted to index numbers with 1940 equalling 100. Figure 1 of Exhibit 180 shows this data graphically.

As noted earlier, the pool supply dropped 10 percent from 1942 to 1944, or from an index of 106 to 96. This was the time when plants were being withdrawn from the pool most rapidly and sales in the marketing area were increasing the fastest. On a percentage basis, the biggest drop occurred in Warren, Hunterdon and Somerset Counties in New Jersey. In 1940 these counties delivered 121 million pounds to the pool. But in 1944, only 60 million pounds were pooled.

The next largest drop occurred in Sussex County, New Jersey, 36 percent, or from 94 million pounds to 60 million pounds. The only other areas with more than a ten percent drop were Cuyaga, 12 percent; Schoharie, 14 percent, and "other New York counties" not separately identified, 18 percent. None of the Pennsylvania counties delivered less milk to the Order 27 pool in 1944 than in 1940. Of 33 counties or groups of counties separately identified for New York, there were 15 which showed a decrease in pool receipts. From 1948 to 1955, Order 27 producer receipts

from Warren, Hunterdon and Somerset Counties in New Jersey increased 284 percent, or from 70 million pounds to 269 million pounds. This was largely the result of the shifting of 6 New Jersey [12,816] plants into the Order 27 pool from 1950 to 1955.

These plants are:

| Town | Company | Date entered pool |
|---|---|---|
| Blairstown | Sussex Milk & Cream Co. | August 1950 |
| Sussex | Franklin Lake Dairy Products | August 1951 |
| Broadway | Sisco Brothers Inc. | August 1952 |
| Califon | B. R. Waldron & Sons, Inc. | August 1953 |
| Port Murray | Port Murray Dairy Co. | August 1954 |
| Allamuchy | Benchester Creamery Co. | August 1954 |
| Frenchtown | Hunterdon Dairy, Inc. | August 1955 |

The number of producers in the New York pool located in these 3 New Jersey counties increased from 424 in 1948 to 987 in 1955, or an increase of 133 percent. Production per day per producer also increased in these counties much faster than for the market as a whole. For the entire Order 27 pool there was an increase of 33 percent from 1948 to 1955 in production per producer. But, in the Warren, Hunterdon and Somerset area, the increase was 65 percent up from 450 pounds per day in 1948 to 741 pounds per day in 1955.

Pool producer receipts from Sussex County, New Jersey, which had shown the second greatest percentage drop in 1940 to 1944 increased from 1948 to 1955; but the increase was not so great as in Warren, Hunterdon and Somerset [12,817] Counties. Producer receipts in Sussex County were up 59 percent compared to the increase of 284 percent in the other three counties. Only one plant was added to the pool in Sussex County, that of the Franklin Dairy Products Company. The number of producers in Sussex County, New Jersey, increased from 270 in 1948 to 326 in 1955, or 21 percent.

In Tables 17 and 18 the category headed "Pennsylvania —All Others (Counties) and not including Lancaster County, showed an increase of 163 percent in producer receipts to the Order 27 pool from 1948 to 1955. Lancaster County

showed an increase of 81 percent from 1949. This county was not reported separately for 1948

Plants in this area in Pennsylvania which have entered the Order 27 pool since 1948 include Centerville which had withdrawn in June 1946 and returned in August 1949; Dushore coming in for the first time in 1949; Millhall, which withdraw in July 1941 and returned in 1949; New Holland which withdrew in 1942 and returned in August 1949; Mifflinburgh which came in for the first time in August 1950; Greencastle which came under Order 27 for the first time in 1949 and left in April 1956; Elliottsburg, which came in for the first time in August 1951; Lincoln which came in for the first time in August 1952; Port Allegany, which came in for the first time in August 1952; Millport, which came in for the first time in 1952; Milton, which came under Order 27 for the first time in [12,818] August 1953; and Myerstown, which came under Order 27 in August 1955.

From 1948 to 1954, the total number of producers under Order 27 increased from 45,047 to 50,088 or an increase of 5,041, but then dropped to 49,331 in 1955 and to 47,142 in 1956. Of the total increase, 2,740 or more than half of the total came from "All Other Counties", Pennsylvania'.

During the same time, the number of producers under Order 61 in Philadelphia decreased from 9,097 to 7,668, or a drop of 1,429. This is a drop of 16 percent in the number of producers in the Order 61 market, while the Order 27 market had an increase of 10 percent in number of producers.

In Exhibit 136, Table 13 of this record, data are given for the same areas as Table 17 of the Exhibit 180 by months for the late 1955 and early 1956. This Table 13, Exhibit 136, and the discussion of it, illustrates the in and out contra-seasonal movement of producers and plants on a monthly basis. In Exhibit 180, Table 19, "Number of Plants, Producers and Volume by States, Order 61, 1943-1948" 1955—More Detail on the Movement of Producers out of Order 61 is given. This table shows that there was

42 less plants under Order 61 in 1955 than in 1943. All of this reduction in plants occurred in Pennsylvania. As there were 13 plants in Maryland and Delaware in 1943, 1948 and 1955

There were 7,463 Order 61 producers in Pennsylvania [12,819] in 1948 and 6,078 in 1955. This is a drop of 1,385 producers or 19 percent; Only 44 less producers delivered in the Order 61 plants in Maryland and Delaware in 1955 than in 1948. The volume of milk in Order 61 plants increased 21 percent in Pennsylvania from 1948 to 1955; but in Maryland and Delaware, the increase was 54 per cent for this 7 year period.

Of the 5,041 producers added to the Order 27 pool from 1948 through 1954, 3,485 came from "All Others", Pennsylvania and Bradford County, Pennsylvania. Because of the increase in producers under Order 27 indicated above, and the large decrease in plants and producers under 61 in the same general area of Pennsylvania, it does seem clear that many of the plants and their producers leaving order 61 have shifted to Order 27.

With the movement of producers and supply out of the Order 61 pool and into the Order 27 pool, there has been an increase of only 27 percent in the total supply of the Philadelphia Order 61 pool from 1948 to 1955. During this same period of time, the Order 27 pool supply increased 46 percent.

All of the increase in receipts of milk in the Order 27 pool from "All Others", Pennsylvania cannot be attributed to a shift of plants and producers from Order 61 because the added number of Pennsylvania producers is more than twice the number of producers who have left Order 61.

[12,820] The large number of additional producers under Order 27 from this region, and general knowledge of the situation in this region, suggest that as total milk production and production per producer has increased generally in Pennsylvania, the Order 27 pool has absorbed sur-

plus milk from numerous secondary markets, such as Reading, Scranton, Wilkes Barre, Williamsport, Altoona, York, Lancaster, so forth; and, also, has absorbed milk formerly used for manufacturing purposes.

Two of the new plants in the Pennsylvania area are the Lincoln and Myerstown plants of The Hershey Chocolate Corporation. Bradford County, Pennsylvania showed an increase of 147 percent in receipts of milk in the New York pool from 1948 to 1955. The number of producers increased 65 percent and production per producer increased 48 percent. Three new plants have come into the pool in Bradford County since 1948: Columbia, Cross Roads, Grover and Wyalusing.

The next area of greatest increase in Order 27 pool supply since 1948 is southwestern New York. This includes the Finger Lakes region of Tioga, Seneca, Yates, Ontario and Livingston Counties, which are reported by the Market Administrator in a single total; and the Counties of Steuben, Allegheny and Cattaragus, which are reported separately. This area contributed 312 million out of the total increase of 2 billion, 542 million pounds of milk in Order 27 pool in [12,821] 1955 compared to 1948. Allegheny County showed an increase of 53 percent, Cattaragus increased 62 percent; Steuben was up 93 percent, and the Finger Lakes region was up 80 per cent; also, Tioga County was up 74 percent. This area, including Tioga County, New York had five plants returning to the pool in 1949 and later years which were formerly in the pool, and four more plants which entered the pool for the first time in 1949 and later years.

Some of these plants were primarily manufacturing operations before qualifying for and entering the Order 27 pool. The other areas showing the largest degree of increase is the marketing area now described under Order 27. There was a total of 19 million pounds in 1948.

There was an increase from 19 million pounds in 1948

to 119 million pounds in 1955. This increase of 100 million pounds of milk represents a 624 per cent increase.

It is believed that this increase is largely a shift of milk in the pool formerly delivered to country plants in the nearby counties, with the shift encouraged by the recent advent of the bulk tank pickup system and its savings in handler procurement cost of milk assembly, and the opportunity of obtaining an additional 10 cent location differential to producers located in the location differential area who deliver their milk directly to handlers in the market area. [12,822] There has also been some shifting of producers in Sullivan County, New York to plants in Orange and Ulster Counties because of the opportunity to gain a 20 cent location differential which has not existed up to this time in Sullivan County.

Figure 2 of this exhibit is a map of the milk shed that graphically portrays this change in volume of milk pool of Exhibit 180. This is figure 2 of Exhibit 180. These conditions described here are indicative of the need for pool plant rule and other revisions of Order 27, along with the extension of the marketing area.

* * * * *

[12,917] Let me say first, before starting on these conclusions, that they are based on the statistical data included in the tables in Exhibit 180, and the description I have given of that data and its meaning.

No. 1, producer prices for milk in this milkshed have not moved upward with increasing cost of producing milk.

No. 2, the milk to be priced by this extended regulation is within the flow of interstate trade.

No. 3, the following disorderly marketing conditions exist in this market and milkshed, A, almost a complete breakdown of OMI classification and pricing to New Jersey producers;

B, inability of both unregulated and Order 27 regulated producers to receive full class prices for milk consumed in Northern New Jersey;

C, Order 27 producers carry most of the burden of reserve supplies for the Northern New Jersey segment of the market, without sharing fully in the fluid utilization benefits of that particular area.

No. 4, Order 27 should be amended to include [12,918] the Northern New Jersey area under a single order, because, A, the milk supply is almost completely intermingled;

B, marketing channels and marketing facilities are identical, and marketers within these marketing channels are in close competition for supplies, facilities and consumers;

C, producer milk price-making forces are identical;

D, handlers and their milk supplies associated with each segment of the present and proposed marketing area cannot be separated for the purpose of Federal milk regulation, and achieve orderly marketing conditions in this milkshed.

Mr. WILLIAMS: Could I have that last sentence re-read?

Examiner HYDE: You mean you couldn't hear him?

Mr. WILLIAMS: I didn't catch it.

Examiner HYDE: The reporter will read the last sentence, Item D.

(The last sentence of the witness was read by the reporter.)

The WITNESS: 5, under a federally regulated market, consumers in Northern New Jersey can be assured of an adequate supply of pure and wholesome milk only by means of the extension of Order 27 marketing area with a single order.

This concludes the statement that I am making with [12,919] reference to need for regulation of the Northern New Jersey area and the need for amending Order No. 27.

The second section of my statement, as announced yesterday, is concerned with proposed amendments to Order 27; and I would suggest that interested parties make available to themselves copies of Exhibit 4-A, copies of Exhibit 177, and a copy of the rules and regulations for Order 27.

Mr. WINTON: Do you mean Order 27, or the rules and regulations under Order 27?

The WITNESS: I mean a copy of the order itself. I will have the exhibit number for you in just a moment.

Mr. MURPHY: 86, I believe.

The WITNESS: It is Exhibit 86 in this hearing record.

In discussing amendments to Order 27 I shall take each section of the act as contained in Exhibit 86 of this record, and where there are amendments that we are proposing, I shall discuss the need for the amendment briefly, and then give the details of it, and in so far as possible give it in Order language some time during the discussion of each section.

Mr. POLIKOFF: Do I understand that you are not going to give the order language, except as you come to each section in connection with your testimony, you are not going to tell us in advance what your overall language is? [12,920] The WITNESS: It's going to vary with different items. Let me proceed and try to work the thing out.

Mr. WINTON: I understand we will get a copy of this under the same terms as we are to get the prior testimony of this witness?

Mr. WILES: That's right.

The WITNESS: Those sections that I do not discuss, the meaning there is that they should be retained as now written in Order 27.

And I want to start with Section 927.3, which is the marketing area definition. We are proposing that that marketing area definition be amended to include all of the 13 Northern New Jersey counties named in Exhibit 4-A, plus whatever upstate New York area the Secretary defines on the basis of the previous parts of this hearing record, and the entire area now defined in this section 927.3.

The reasons for this particular amendment have already been given in my discussion with reference to need for regulation and need for amending Order 27. I shall not

repeat that testimony again at this time with reference to this particular item.

The next items in Exhibit 86 that I would like to discuss are Sections 927.7 and 927.8. We are not proposing any amendments to these two sections. My discussion of them is merely to call the Secretary's attention to a [12,921] marketing condition in the milkshed for his consideration at this time. The condition I want to discuss has to do with bulk tank transportation from the farm to the plant. That plant may be a country plant, it may be a distributing plant, either in or out of the marketing area. The problem is minor at this time, because we have only a very limited number of producers that place their milk in bulk tank coolers on the farm, and have it transported from the farm to the buyer via means of a bulk tank truck.

The problem that we think exists to a very limited extent now, and one that could exist or develop to a point of being serious, if bulk tank transportation becomes more prevalent, has to do with the relationships of the buyers of producer milk to the producer and to the Market Administrator of the order. This relationship is peculiar to those buyers of producer milk where the buyer doesn't own and operate that milk or move that milk through a stationary pool plant. For example, the buyer of producer milk may be selling on-the-spot markets, he may be selling to a different processor and distributor each day, he may or may not be pooled, he may be operating in such a way that the Market Administrator would not determine or find the milk in the market. And we think this problem could give difficulty to the Market Administrator with reference to the responsibility of the handler for the keeping [12,922] of records and the paying of producers for this milk, and the responsibility of the handler for accounting to the pool on milk received from producers and on utilization of that milk. We have no recommendation to make, or no proposal to offer with reference to amendments at this time. We do point out that one method of amendment that might solve the problem would be to as-

sociate a bulk tank operation with a stationary plant for some period of time, either on a monthly basis or a longer period of time. Our only objective is to secure stability and orderly marketing of this type of milk, and to be sure that it is properly accounted for both to the producers and to the pool.

The next section of Exhibit 86 that I shall discuss is Section 927.2 through 927.26. These are the——

Mr. WINTON: Would you give those figures again.

The WITNESS: I'm sorry, it's 927.20 through 927.26. These are the pool plant rules, other than the pool plant rule dealing with shipping plants.

I shall also discuss that rule immediately following my discussion of the first series of sections of the order.

The proposed amendments here are appropriate amendments to Exhibit 4-*N*, and are our interpretations of the amendments indicated in Exhibit 177, Item 1.

Mr. WILLIAMS: Mr. Presiding Officer, I don't want [12,923] to interrupt, but are these amendments or interpretations of Exhibit 177? Just for clarification.

Mr. MOORE: These are proposals.

Examiner HYDE: Will the reporter read Dr. Brown's last couple, three sentences.

(The last sentence of the witness was read by the reporter.)

Mr. WILLIAMS: In other words, I am merely asking whether this is an appropriate amendment to numbered paragraph 1 of Exhibit 177, or is it merely an interpretation of numbered paragraph 1?

The WITNESS: It is our proposal for amendment to Order 27, to facilitate the language included in Item 1 of Exhibit 177.

Mr. WILLIAMS: Mr. Presiding Officer, I don't think that's responsive to my question.

Mr. WILES: Well, that's exactly what it is. That's what he intends to do.

Examiner HYDE: If that's what it is, I don't know how he can respond any other way.

Mr. WILLIAMS: Well, one moment he said it was an interpretation, and then he said it was an appropriate amendment to this. Now, it's either one or the other, it can't be both.

Examiner HYDE: Now he is explaining to you what [12,924] exactly it is, and that's what you wanted to know, I thought.

Mr. WILLIAMS: I am afraid I am dumb, but I don't know whether it is an amendment or interpretation of this language.

Well, I'll waive it.

Examiner HYDE: You will have the transcript shortly, and if you are not satisfied with what he gave you then, ask him about it at that time.

Go ahead.

The WITNESS: In the earlier part of this statement reference was made to movement of producers, plants and milk supplies in and out of order 27 in the opposite direction of need for the fluid market, both on a seasonal basis annually, and over long periods of years. In addition it has been made very clear that Order 27 as now operated is carrying the surplus burden for the secondary markets in upstate New York, other than Rochester and Buffalo, and for the Northern New Jersey area proposed to be added to the Order 27 marketing area.

Likewise Order 27 carries in part the surplus burden for numerous secondary markets in Pennsylvania and the New England States. These conditions we consider to be disorderly, and which fail to fully effectuate the purposes of the Agricultural Marketing Agreements Act of 1937, as amended. These disorderly practices result in [12,925] lower prices paid producers than would otherwise be paid producers under more orderly conditions. These disorderly practices in area extension indicate the need for new pool plant rules.

It is proposed to replace Sections 927.20, 927.21, and

927.22 with provisions that would designate as permanent pool plants, at the handlers' choice, a, all plants——

Mr. WINTON: Would you do that slowly, so we can get it.

The WITNESS: All plants which were designated as pool plants in Order 27 for the month of December, 1956.

Mr. WINTON: Do you mean reserve pool, or pool——

The WITNESS: Reserve pool plants.

B, all unregulated plants which had a historical relationship to Northern New Jersey and or upstate New York areas proposed for extension. Historical relationship as used here should be measured by the actual shipment of 60 per cent or more of producer receipts of milk for fluid use from each such plant into the Northern New Jersey and/or upstate New York area extension during each of the months of July through December, 1956.

C, all distributors of fluid milk in consumer packaged form, with pasteurizing and packaging facilities [12,926] located within the proposed marketing area extension of New Jersey or upstate New York, who distributed fluid milk to consumers in the proposed area extension in December, 1956, irrespective of any previous Order 27 status or any existing Order 27 status, as of December, 1956, on a historical or performance basis.

Mr. WINTON: May I have that last thing read back.

Examiner HYDE: The last sentence or the last——

Mr. WINTON: Item C.

Examiner HYDE: Will the reporter read it, please.

(Item C, the last sentence of the witness, was read by the reporter.)

Mr. WINTON: What does that last part refer to?

The WITNESS: With reference to Order 27 plants, its application would be to shipping plants that were shipping plants in December, 1956 and that met all of the other requirements of this Item C. They would have pool plant designation as permanent pool plants.

Examiner HYDE: At this point we will have our afternoon recess.

(Recess had.)

Examiner HYDE: The hearing is in order.

The WITNESS: Data with reference to the actual shipment of milk from presently unregulated plants, or with [12,927] reference to pasteurizing and distribution operations, can be obtained by the Secretary from OMI, from the Commission of Agriculture and Markets of the State of New York, and from similar governmental agencies in other states. Application for permanent pool plant status must be made by each handler for his plant or plants during the first month of the effective date of the amendment.

Any plant designated as a permanent pool plant under the above requirements lose this permanent designation if the plant owner requested and was granted removal of the plant, or if the plant owner failed to meet requirements as indicated in Section 927.23 of Order 27 as now written.

The date for cancellation and requirements for cancellation or suspension are indicated in Section 927.4. We propose to amend this particular section by changing the month or months of withdrawal from those now specified in Section 927.24 (a), which now reads, "From April to July," to read, "January through March."

Section 927.24 (d) would be eliminated in our proposal.

Sections 927.25 and 927.26 should be retained without change.

The next section that I shall discuss is 927.27, dealing with shipping plants. Section 927.27 should be amended, and should apply to all plants to be pooled that are [12,928] not designated as permanent pool plants under our proposal for Sections 927.20, or whatever might be written to replace 927.20 and 927.21 and 927.22.

Our recommendation and proposal for 927.27 is that the requirement of 25 per cent Class I utilization in July through March be retained, and the 60 per cent Class I-A

utilization in October, November and December, if the plant is to be pooled in April, May and June following, will be retained.

In addition we would add a proviso that says that "any plant that was in the Order 27 pool under this section during the months of April, May and June would automatically be in the Order 27 pool any of the following nine months of July through March, when the utilization at that plant was 60 per cent or more fluid sales, either inside or outside the marketing area."

Plants qualifying under this proviso would not necessarily have to qualify under the 25 per cent Class I-A in the marketing area proviso for designation as shipping plants.

Mr. POLIKOFF: Will you please repeat that.

Examiner HYDE: Will the reporter read that.

(Last sentence of the witness read by the reporter.)

The WITNESS: The proposed permanent pool plant [12,929] rules would permit any plant or distributor now historically associated with the present marketing area or the proposed marketing area extension to be permanently designated as a pool plant, pending suspension or cancellation. This change in pool plant rules is desired to retain an adequate supply of milk from plants which show a historical relationship to the present and extended marketing area. This method of designation also permits specialization of operation, so that plants with manufacturing facilities can serve to receive reserve pool supplies from producers long associated with the marketing area, and from other pool plants that do not have such facilities.

Thus a few plants with such permanent designation are now and should continue as manufacturing plants seasonally, and until their reserve supplies are needed for the purpose of more efficiently handling reserve supplies in the pool.

The proposed amendment to Section 927.24 will keep plants in the pool during the months of shorter milk sup-

plies, thus these plants will be of more benefit to both consumers and producers. It will permit these plants to leave the pool only those months when supplies are needed the least for consumers.

The proposed amendments to Section 927.27 relating to shipping plants are designed to reduce the disorderly effects of contra-seasonal movement of plants and [12,930] their producers in and out of the Order 27 pool. The amendment would mean that any shipping plant in the Order 27 pool in April, May and June, because of the 60 per cent Class I-A milk, the previous October, November and December, would be automatically pooled during any subsequent nine-month period when fluid utilization at that plant exceeded 60 per cent. This 60 per cent is near the estimated pool average for this period of months.

These amendments to pool plant rules may help to restore orderly marketing conditions so far as the movement of plants are concerned. The proposed new rules will not prevent a producer from moving in and out of the pool as he may desire. Neither will the rules prevent a handler from moving his plant in and out of the pool as he may desire. These proposed amendments merely establish the rules under which such movement can be made.

It is proposed that these rules for permanent pool plant status, for suspension and cancellation, and for shipping plants, be applied to all plants regardless of where located in the United States. With the extension of the marketing area and with these proposed amendments made in pool plant rules, we do not believe there would be any hardship on any plant or any producer in qualifying for pool participation.

In addition we believe the rules would be such that [12,931] this disorderly condition of in-and-out plant and producer movement that now exists, which is associated in part with lack of regulation with Northern New Jersey area, and Order 27 marketing area under a single order,

would be brought to a more orderly marketing program, to the benefit of producers, handlers, and consumers.

My next section to discuss will be the sections of 927.30 as outlined in Exhibit 86 under the general heading of "Classification." Disorderly conditions now existing in Order 27 and milk marketing conditions in the proposed area for extension to Order 27 marketing area indicate the need for certain revisions in classification sections of the order, Sections 927.30 through Section 927.37.

Disorderly conditions at the present time consist of the following: 1-C milk can be classified at a pool plant on the basis of shipment to a non-pool plant, on declaration of the plant handler that the milk is fluid utilization. [12,932] The non-pool plant receiving the 1-C milk must be located in the 1-C area, that is, New York State, outside the marketing area and the named counties in New Jersey. It is possible for the non-pool plant receiving this 1-C milk to move it from the non pool plant to 1-B areas out of the market where it eventually is used as fluid milk. Such a movement might be New England or into any of the New England states, or into Pennsylvania, or into any of the states south.

Movement of 1-C milk in this fashion is known to exist. The volume of such movement is not known, and is not substantial. However the fact that such a movement can and does take place creates doubt in the minds of producers that fluid milk is properly priced, according to the intent of the Order, even though it is properly priced according to the rules and regulations.

There is a belief among producers that all fluid sales should be priced at the Class 1-A fluid price. By eliminating the Class 1-C classification and by regulating the 13 Northern New Jersey counties and the area defined in this record in upstate New York with Order 27, there would be no need for a continuation of the 1-C classification, since this is the major area where 1-C milk can be properly sold and utilized as fluid milk. This we propose to do.

There is another problem of disorder associated

[12,933] with 1-C sales, and with the area in Northern New Jersey and upstate New York proposed for extension to Order 27. The 1-C classification and pricing program was originally designed to provide a competitive price with unregulated milk serving this area. It would be necessary to continue 1-C classification and pricing if any part of this area were not regulated as an extension to Order 27. By extending Order 27 and regulation handlers in the proposed areas the competitive condition with unregulated milk is equalized, and the opportunity for all producers to obtain the full 1-A price and for all handlers to have equal costs in this area is provided.

In addition to the competitive condition, Order 27 producers are carrying the surplus burden for the unregulated area without acquiring any of the benefits of full class pricing. Regulation of the area by separate orders would not obtain solution to these conditions.

These disorderly conditions can be corrected only by extending the Order 27 marketing area, and defining all fluid sales in the present Order 27 marketing area and the area added by extension as 1-A sales. Such an amendment could be achieved by striking 927.37(c) and all references to Class I-C milk contained in 927.30 through 927.37 and other sections of the Order.

* * * * *

[12,998] Dr. Brown, you may continue.

The WITNESS: In Exhibit 86 the section dealing with producer settlement fund and its operations, section 927.78, provides the regulation with reference to payment on milk received from dairy farmers at non-pool plants. We propose the application of this section as it is now in Order 27 to the extended marketing area. This type of payment is essential to equate costs to handlers for milk received from various sources.

However, the extension of the marketing area and the proposed amendments with reference to plant rules and

with reference to classification and pricing would indicate certain problems regarding what we call peripheral milk. Item 7 of Exhibit 177 proposes certain changes to the new order, or the amended Order 27, to solve this type of problem. We support the changes indicated in Item 7 of Exhibit 177.

It is our belief that the method of amending the order to facilitate items (a) and (b) of No. 7, Exhibit 177, would be first to provide an option to the plant outside the marketing area that has a quantity of route sales in the marketing area which are insufficient to subject the plant to full regulation. The option indicated would be that of being a pool plant for the month involved, thus being subject to full regulation; or the option of making [12,999] compensatory payments at the rates provided for now under Order 27 on its fluid sales in the marketing area.

In addition we believe and propose that should this plant choose, this plant that has route sales in the marketing area, choose to become a pool plant, that its route sales outside the marketing area be priced at the I-A price, rather than the full proposed I-B price, during the last six months of the year. By making these adjustments in the I-B price—and the dealer under any circumstances has his option of pooling or not pooling—we believe that the problem of handlers with route sales from plants outside the marketing area would receive just and equitable treatment so far as their competitive conditions are concerned with handlers whose plants are inside the marketing area.

There may be additional changes needed to facilitate the proposals which we have made, and I am meaning such changes as eliminating I-C, wherever it might appear in the order language; the definitions that might be needed with reference to base milk and excess milk; the definition, if any, that might be needed for such terms as "producer-dealer," or "certified milk." Whatever those definitions are that are needed to facilitate the proposals we have

made, we support those definitions and urge their incorporation.

* * * * *

By Col. DANIELS:

[13,181] Q. Dr. Brown, let me ask you whether or not—I am going to name specific plants now, to see whether or not, in line with Mr. Lent's admonition, you considered the operation of, say, Decker?

Examiner HYDE: Who?

Q. Decker, Decker's Dairy.

[13,182] A. That's in——

Q. South Jersey.

Mr. LENT: No.

Q. It's in Hightstown?

A. Yes.

Q. Well, what would lead you to conclude that Order 27 is carrying any of Mr. Decker's surplus, what facts did you consider?

Mr. LENT: Mr. Decker's operation is not the type of operation which counsel and the witness have been discussing and to which the witness' previous answers apply.

Q. Because he sells package milk in this area, is that right, Dr. Brown; did you include that?

A. Yes.

Q. All right, let's take Lehigh Valley.

A. It would not appl.

Q. Do you know what they do?

A. They sell both packaged and bulk milk in the proposed extended area.

Q. And you do not believe that Order 27 carries any of their surplus?

A. I'm not so sure but what it does, for both of the plants.

Q. Do you have any facts that led you to that conclusion?

[13,183] A. Yes.

Q. Then I will argue against your interpretation later.

A. The data contained in table 2—tables 1 and 2—would be the factual data behind this particular——

Q. Tables 1 and 2, where?

A. Of Exhibit 180.

Q. 180?

A. Yes, where we point out that unregulated plants such as you are mentioning do tend to have a high percentage of fluid sales both in and out of the proposed area. They tend to have a higher percentage of fluid sales in the proposed area during the first six months, and a lower percentage during the last six months.

The consumers in this area depend on Order 27 supplies to a much greater extent during the last six months, and that is the technique by which Order 27 producers are carrying the surplus burden for this whole region.

Q. Well, now, let me ask you: you say Table 2?

A. Of Exhibit 180.

Q. Yes.

A. And there is a—a figure that goes with Table 2, figure 3 of Exhibit 180, illustrates the same type of information graphically.

Q. Well, now, Doctor, let me draw your attention to [13,184] unregulated plants in New York and in Pennsylvania. Now, what did you just say about the last six months; where does that table show me that?

A. I think you can pick it up quicker, if you haven't read my full testimony, by looking at——

Q. I can't if they don't give it to me.

A. —figure 3.

Q. In the same table?

A. In this same exhibit.

Q. Table what?

A. Figure 3 of this same exhibit.

Examiner HYDE: Exhibit 180.

A. Of Exhibit 180, that's right.

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[13,397] Examiner HYDE: Both motions to strike are denied.

Proceed.

The WITNESS: Now I will discuss this question without any implications as to whether he did or did not perpetuate any error.

Any question of pricing in Northern New Jersey, particularly with reference to 1-C, with reference to unregulated milk available, with reference to the efforts of OMI, must be viewed in the total and the long perspective starting, so far as I am concerned, with 1935, 1937, on through to date.

What we have had is a single producer supply market for milk with regulation of the class prices in only a part of that consumer and producer supply market. During the 1940's, up through 1948, there was a shortage of milk for fluid uses in the entire region. The unregulated supplies of milk and the 1-C supplies of milk available for use either in the unregulated part of the area or in other regions, particularly regions to the south, gave no difficulties so [13,398] far as pricing is concerned to the Order 27 producers and to OMI in their efforts to price according to classification in New Jersey.

Somewhere along 1948 the supply conditions in the production area changed materially. The southern markets did not need the milk produced in this region. The New Jersey market had sufficient supplies from both regulated and unregulated sources, but as production increased, with no companion increase in utilization either within the market or out of the market, this problem of pricing 1-C milk, of pricing unregulated milk, of pricing milk by OMI, developed into a disorderly condition.

It is the competitive condition between those three sources of supply for the Northern New Jersey market; it is the competitive condition that will remain competitive if Order 27 producers are to serve that market without the market being regulated; it is the condition that can be solved completely and permanently and to the ad-

vantage of both the regulated and unregulated producers in the entire milkshed, if it is handled as we are proposing at this time.

By Col. DANIELS:

Q. Are you through, Doctor?

A. Yes.

Q. Doctor, I am glad you made that statement. Then we are together on this: That the 1-C milk at $1.20 a [13,399] hundredweight less than the OMI is creating a competitive price situation with OMI—I will come to unregulated milk in a minute—that is a fact, isn't it?

A. We are together only that the total situation is creating this particular variance that you report, which is a fact, and it is only by total regulation that that price inequity to producers can be corrected.

Q. Doctor, if the present Order 27 were amended to eliminate 1-C, that one factor would be removed—then we will move on to the next one—would it not?

A. It would not remove that factor unless the Northern New Jersey market were also regulated as a part of Order 27.

Q. Doctor, if 1-C milk were eliminated and the handler who sold fluid milk in Northern New Jersey had to pay the 1-B price, he would be paying in 1956 an average of $5.64, as compared with $4.50 that he pays now, is that right?

Mr. WINTON: I object. The question assumes he can sell the milk and that the handler would pay it. He just means that the price of the order would be there.

Col. DANIELS: That is what he would be required to do if he sold any fluid milk in Northern New Jersey and if he were an Order 27 dealer.

The WITNESS: That is what the order would say, that the price of milk would be under those conditions, [13,400] except that that is not an accurate assumption of what would happen.

By Col. DANIELS:

Q. Doctor, if he were not an Order 27 plant—and I promise you I will come to the unregulated—but bought all his milk from New Jersey producers, that is, producers located in New Jersey, and sold his milk in Class I in Northern New Jersey, he would be required to pay $5.70, rather than the $4.50. That assumption is right, is it not?

A. No.

Q. If he bought all his milk from New Jersey located producers and sold it in fluid form, he would not be required to pay under OMI the price of $5.70?

A. With the words "if he" in the question, yes, except that he is not about to do that.

Q. All right. I am saying as far as the orders are concerned, and if that were the situation he would be required to do it, wouldn't he, if he bought it all from New Jersey producers and sold it in fluid form in New Jersey?

A. Yes, but the situation that would prevail under that assumption would be, in my opinion, more of the New Jersey produced milk would move into Order 27 and more of the unregulated supplies from out of the state would move into the New Jersey market.

Q. We are coming to unregulated. You just anticipated [13,401] my question, or have been trying to.

The unregulated milk then would be faced with this situation: That the prices they would compete with would be $5.70 and $5.64.

A. No. They would be competing with the uniform price of Order 27, which is 20 cents less than the 1-C price for Order 27 which they are now competing with.

Q. Why would they be competing with that in Northern New Jersey for fluid milk?

A. Because those unregulated plants are located in the same production area in upstate New York and Pennsylvania, and the uniform price is the competitive price.

Q. But the uniform price would be raised, would it not, if they sold what is now 1-C milk at a 1-C price?

Mr. WINTON: I object, Mr. Presiding Officer. The record is to the contrary. We adduced evidence in the upstate part of these proceedings to the effect that changing the 1-C price to a 1-B price in certain areas would result in disastrous effect upon the pool.

Col. DANIELS: Because someone might have so testified does not make my question objectionable when I ask Dr. Brown the question under these assumptions. Maybe Dr. Brown does not agree with it.

Mr. WINTON: Do you propose to prove that independently?

[13,402] Col. DANIELS: I propose to cross-examine on these particular points which are in his tables here.

Examiner HYDE: The objection is overruled.

The WITNESS: The assumption in your question is false. With Order 27 milk at 1-B instead of 1-C and no Federal regulation under Order 27 in New Jersey, that would not be the source of the New Jersey supply.

By Col. DANIELS:

Q. It would come, you say, from unregulated sources?

A. That is correct, out-of-state unregulated sources.

Q. Let us take Pennsylvania. The farmers over in Pennsylvania, of course, would know what the provisions of the orders are, both Federal Order 27 and the OMI, and have you examined to see what the blend prices are to the farmers in Pennsylvania in the same territory as farmers in Pennsylvania that ship into Northern New Jersey?

A. The milk supply in Pennsylvania that is unregulated and that is moving into Northern New Jersey, is not priced by the PMCC program, and in addition to that the price paid producers is a competitive price at the Order 27 blend.

Q. Doctor, will you explain whether or not your investigation indicated whether they don't fix any price for any milk coming out of Pennsylvania into Northern New

Jersey? When I say "they" I am speaking of the Pennsylvania Milk Control Commission.

[13,403] A. They may have a schedule of prices on bulk sale. In the Philadelphia hearing it was brought out that that price was competitive with Order 27, and that in addition to that they were not in a position to enforce the price on bulk sales out of state.

Q. Doctor, I don't like to disagree with you, but I will help you to this extent: There are no orders fixing the bulk price. But that wasn't my question. My question is that your investigation disclosed that the Pennsylvania Milk Control Commission fixes no prices for fluid milk moving into Northern New Jersey in any form.

A. It is my understanding that they do attempt to fix a price on packaged goods that are produced in Pennsylvania, packaged in Pennsylvania and distributed in other states.

Q. Are you using the word "attempt" advisedly? If you are I would like for you to state to me why you assume that they are not enforcing it, as opposed to attempting to enforce it.

A. I don't know whether they are or are not enforcing it.

Q. All right. Dr. Brown, what facts do you rely on that would indicate that a Pennsylvania farmer, if he no longer competes with 1-C milk, would sell his milk in here at the Order 27 uniform price, or slightly above, [13,404] rather than demanding the blend price that is being paid under the Pennsylvania Milk Control Commission orders in the territory in which this farmer is located?

A. There is a limited volume of milk that can be marketed in the consumer markets controlled and priced by the PMCC program. That particular limited supply of that limited market is already supplied.

Their alternative is either unregulated sales, or sales to handlers not regulated by Order 27 or Order 61, or sales to handlers that are regulated by those two orders. The competitive price in this situation would be the Order 27

uniform price or the Order 61 handlers' price in that particular community.

Q. Now, then, the one reason that the Order 27 uniform price is as low as it is, is because what you have just stated as a situation under PMCC is because the producers are producing more milk under Order 27 than this limited market can use in Class I, which results in a Class I utilization of 47 percent for 1955, isn't that so?

A. No. I will say what is so with reference to your question.

What is so, producers in the milkshed, regardless of what particular order or state agency that might be regulating the sale of their milk, the total of all producers and their production is greater than fluid sales in the [13,405] region.

Q. Dr. Brown, if we eliminated 1-C and made it 1-B, and you say that that would not give us the desired results, that they would compete with the uniform price, couldn't that uniform price be corrected by having the pool provisions of Order 27 tightened somewhat so that we would not have as much milk in the pool as we do have, which results in a 45 percent utilization for 1955?

A. The kind of tightening that I think you are referring to would deny some producer and some plant access to the market. We are not for any type of program that will deny any producer or any plant access to the market.

Mr. POLIKOFF: That word is "access," is it not?

The WITNESS: Yes, sir.

Examiner HYDE: We will now recess for lunch. We will resume in this room at exactly 2:00 o'clock this afternoon.

(Whereupon, at 12:05 p.m. the hearing was recessed, to reconvene at 2:00 o'clock p.m., the same day.)

PROMULGATION PROCEEDINGS
DR. DORRIS D. BROWN

[13,406] AFTERNOON SESSION

2:00 p.m.

Examiner HYDE: The hearing is in order.

Colonel Daniels, you may proceed.

Whereupon, DORRIS BROWN, the witness on the stand at the time of the recess, resumed the stand and testified further as follows:

EXAMINATION (Continued)

By Col. DANIELS:

Q. Dr. Brown, I am going to try to finish this afternoon. I am going to try to refrain from arguing, and we will hope that maybe you will.

We were developing certain competitive factors from a price standpoint this morning and we had passed all of them until we got to the uniform price under Federal Order 27 and, of course, you took the position that the unregulated milk would be competing with the uniform price when getting milk into Northern New Jersey.

Without agreeing that that is so—and I will leave that for the brief—the amount of milk that is utilized either in Class 1-A or Class 1-B is what fixes or influences the uniform price, isn't it?

A. Those are two of the factors.

Q. Well, the actual class prices.

[13,407] A. The actual class price would be a weighted average of the utilization. There are two items in utilization.

Q. The utilization for the year 1955, I believe I referred you to the testimony, was either 45 or 47 percent. The figure slips me. Am I right?

A. 47 percent for 1955.

Q. Yes. If the provisions regarding the pool plants were somewhat tight, that utilization in Class 1-A would be higher, would it not?

A. It depends on how you interpret "somewhat tight" and the effect of any pool plant rules with reference to

total volume of milk that would be under the order, and also I am quite sure that provision other than pool plant rules and economic conditions, both in and out of the market, as related to producers' decisions to produce and handlers' decisions where to pool and market their milk, would have some bearing on the question.

Q. But we will have to admit, Doctor, will we not, that if the pool plant provisions were revised or amended in such a fashion that less milk would come in the area, that utilization would go up?

A. I think we would admit that if less milk were in the pool, all other things being equal, utilization would go up and the uniform price would go up.

Q. All right. Are you not recommending tighter [13,408] provisions or a revision of the pooling provisions in such a manner as to limit the supply of milk in a manner in which it is not now limited?

A. I would not put it that way.

Q. Are you not putting upon the pool plants more requirements which you believe are reasonable than presently are put upon a pool plant?

A. We are proposing certain amendments to the pool plant rules that I think could be interpreted as including additional rules that are not now in Order 27, yes.

Q. One of your objectives there is to keep milk in good balance, but still raise the Class I-A utilization, isn't that what you are trying to do?

A. That is one of the mechanics of reaching that particular objective, yes.

Q. You did not first decide upon the mechanics and then the objective. You first decided on the objective and looked around for the mechanics through which you can achieve that objective, did you not?

A. And in addition to that we also took a look at conditions in the milkshed as related to present pool plant rules and what we classify or term as disorderly conditions which some change in pool plant rules might solve.

Q. Doctor, there has been some testimony in the rec-

ord as to what was considered by some economists as [13,409] "keeping milk in direct balance." That is, between supply and fluid needs. I don't say I agree with it.

You tell me what you think the percentage of Class I sales ought to be over a period of a year in this market in order to keep milk in good balance, to keep supply and fluid demand in good balance.

A. Did you say "period of a year?"

Q. The average for the year.

A. Over a period of years?

Q. Yes. We are just not going to carve one year out. I want the annual average.

A. I think there are two objectives that we need to keep in mind in answer to that question. One is that the regulation of milk by means of Federal order in the region must be such that producers who are willing and able to produce have access to the market and opportunity to enter the market under the terms of the order.

Q. What do you mean by "region"?

A. I have not finished my answer. I will get to that.

I say that without particular reference to any particular percentage of utilization, Class I or what other classification might be in the order. Producers that want to produce must have the opportunity to participate. So far as an ideal is concerned, and my ideal would be an order [13,410] that in its lowest month of production or highest month of utilization——

Q. That is Class I utilization?

A. Class I utilization.—would strike somewhere in the range of 70 to 80 percent, and for the purpose of getting a figure let us just say 75 percent. I would not expect any orders to achieve that particular status of 75 percent Class I utilization, during those periods of years when producers move into highest production relative to requirements, as they do over a typical time period.

What I am trying to say is that there is a typical operation of milk production that is associated with cow numbers and improvements in techniques that are apart and

aside from the order provisions that must be given consideration.

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[13,420] Examiner HYDE: I have great respect for the opinion of all of you gentlemen. Inasmuch as you are not in agreement on it, I will let the witness answer it.

The WITNESS: With reference to the Northern New Jersey segment of this area, I would refer you to Table 2 with reference to the milk coming in from unregulated plants in New York.

By Col. DANIELS:

Q. Table 2 of what exhibit?

A. Of Exhibit 180. In the month of March 1955, 95 percent of the plant receipts of unregulated plants in New York moved into the Northern New Jersey area and was classified as fluid use.

In June, for that same group of plants, 96 percent.

Mr. WINTON: Where are you reading from, Doctor?

Col. DANIELS: The third column from the one in the parentheses, aren't you?

The WITNESS: It is really the fourth column of figures which would be the percentage figures in parentheses for unregulated plants in New York.

In August that figure was 84 percent and in November 92.9 percent. In 1956, in March it was 96 percent and in June 93 percent.

The similar information is given on the line for [13,421] these same months with reference to unregulated plants in Pennsylvania, and the data there ranges from 82.8, 87.1, 81.2, 80.7, 86.1 and 82.2, as you go through these months for which data is furnished.

By Col. DANIELS:

Q. Doctor, did you base your recommendation on that data?

A. That is one of the major facts, yes.

Q. That does not mean that all of the milk that came into Northern New Jersey plants through receiving stations was used in Class I at the percentages that you have just recited. Other milk comes in, doesn't it, through receiving stations?

A. It is my understanding that this data covers all of the milk that moved into New Jersey from unregulated plants in the Pennsylvania group that is included here on this line "Unregulated Plants in Pennsylvania."

Q. I agree, Doctor. I am looking at your figures. That was not my question.

My question was that those percentages did not represent the percentage of the total milk brought into this area through receiving stations that was used in fluid form. That is my question.

A. Those percentages, plus the milk that came in from Order 27 plants, would represent most of the out-of-state [13,422] milk that came into Northern New Jersey.

Q. This will never make the percentage of total milk received in the area fall way below this 87 to 96 percent, will it?

A. I doubt it. You can add to that all of the Order 27 1-C milk that moved into that area. That was all fluid milk.

Q. That was 15 percent for March. Let us just take one month. That is 15 percent, isn't it?

A. That is 15.9 percent of producer receipts at the plants.

Q. 15.7?

A. 15.9 for New York Order 27 plants and 14.7 for Pennsylvania plants. All of that milk, or 100 percent of that was fluid utilization in Jersey. Now, you weigh that with the data I have given for unregulated plants in New York and Pennsylvania, and put in with it the Allentown Eastern area and the other out-of-state, and I haven't done these calculations at the moment, but it would be my judgment that 95 percent isn't too far off of what you get.

Q. What is the total volume of milk we are speaking about?

A. In the case of March 1955 we are talking about 107.7 million pounds of milk that was either produced in New Jersey or moved into New Jersey for fluid use.

[13,423] Col. DANIELS: Will you read that answer back, please?

(The answer was read by the Reporter.)

By Col. DANIELS:

Q. You mean in the 13 counties?

A. Yes, sir.

Q. What does the 274,300,000 pounds represent?

A. That represents total producer receipts at the plants that are included in this tabulation.

Q. Then that is only 39.3 percent, isn't it, rather than 95?

A. That is quite correct, but of the 274.3 the amount that moved into New Jersey was only that amount shown in the 107.7 million from out of state. There is no data here that shows the amount of milk, other than fluid use, that moved into New Jersey.

Q. That is the point I am making. Then you do not have any basis for saying that 95 percent of all the milk that moved into Northern New Jersey was used in Class I?

A. I do, yes.

Q. How do you do that unless you can tell me how much moved into Northern New Jersey?

A. In the case of the unregulated plants there just wasn't any milk left to speak of to move anywhere.

Q. Tell me what I can look at in Exhibit 180 that will [13,424] sustain that statement.

A. The data that I have just given you with reference to the fact that 95 percent of producer receipts did move in for fluid use from these unregulated plants in New York and 82.8 from Pennsylvania. Those same plants, if you look over to the column that says "Other Class I Uses", you will see that most if not all of the rest of the producer receipts at those unregulated plants were Class

I use. They had no milk left over that could have moved into New Jersey in any other form.

Q. Dr. Brown, you can't escape the fact that this 95.1 percent—now we are going to limit our question to March, the same questions and same answers will apply for each of the other months but the figures will be different—

A. That is right.

Q. You can't escape the fact that that amount of milk represented 55,700,000 pounds. That is true, is it not?

A. I don't follow you, sir.

Q. No, and I shouldn't have asked it. I withdraw the question.

It is true, isn't it, from Table 2, Exhibit 180, that the 95.1 percent which represents the Class I utilization of the unregulated New York plants shipping milk into this area, the amount of milk actually shipped was 27,700,000 [13,425] pounds?

A. No. Let me go over that again with you.

Q. What is that 27,700,000?

A. The producer receipts at that group of plants was 27.7 million pounds. That group of plants shipped 26.3 million pounds into New Jersey for fluid use. It sold 1.4 million pounds in other areas for fluid use. It had zero pounds for any other use that you may want to talk about.

Q. The 26.3 million figure is what I should have used. That is all that came in?

A. And that is all the milk the plants received.

Q. All right. We are not differing on that. Pennsylvania from unregulated sources shipped in 23,200,000 pounds.

A. Of 28 million receipts it also used 4.1 million pounds of that 28 million receipts in fluid uses other places and only had seven-tenths, or 2.4 million pounds, for other uses, which could have been the type of milk that I think you are talking about that might have moved into New Jersey for processed.

Q. You inadvertently said 2.4 million. You mean 2.4 percent, do you not?

A. 2.4 percent, yes, sir.

Q. So that if we add those together that is how many million pounds of milk they shipped into this area, [13,426] which would be 49,500,000 pounds.

A. Of 55.7 million producer receipts.

Q. Oh, yes, Dr. Brown. Thank you. I know that. I am not interested in that. That is what came into this area, wasn't it?

A. For fluid use, yes.

Q. From those two sources?

A. Yes.

Q. But when we take OMI milk there were only 19,700,000 pounds used out of a production of 43,300,000 pounds.

A. According to our estimates, yes.

Q. And then under Order 27 there was only 6,500,000 pounds used out of 34.

A. Million pounds produced in New Jersey.

Q. Yes.

A. And 27.4 million pounds, or the remainder of that production, moved across the river into New York City as Class I-A.

Q. All right. What I am trying to get at is this: Of the total amount of milk that was received in Northern New Jersey, did you determine what percentage that total amount of milk was used in Class I, not just from unregulated sources but from all sources? Doctor, in making your calculations, you know I am talking about only the fluid uses in the 13 counties of Northern New Jersey.

[13,427] A. For the month of March 1955, this data would indicate that the New Jersey production, plus the out-of-state production that moved into New Jersey, would total 125.7 million pounds, 107.7 million of it being fluid utilization, and that is 88.5 percent approximately.

Q. Will you give me the amount of milk again? I did not get it.

A. 125.7.

Q. What figures did you add to get to that?

A. The 43.3 million pounds of OMI producer receipts—

Coloniel Daniels, on this question I think it would save us some time if you let me make this calculation a recess or overnight.

Q. Certainly.

A. I will have the figures in better shape for you then.

Q. The figure 48.3 percent would represent 20,900,000 pounds of milk under the caption "Other Uses." When I look at the explanatory Note C, I find that you say that you assume "other out-of-state to be fluid sales in some territories."

Examiner HYDE: Does this record show what you are referring to?

Col. DANIELS: Yes. Note C on Table 2, Exhibit 180.

[13,428] By Col. DANIELS:

Q. You make that assumption, do you? Do I properly interpret your note?

A. That is right.

Q. Is that one of the factors that you used in determining to make this recommendation that we have been speaking of?

A. That is part of it, yes.

Q. But you do not know that your assumption is correct, do you?

A. Not other than a manner of judgment.

Q. What do you mean by that?

A. There are fluid sales that move from this area to points in Maryland or Delaware, for example. The particular volume and the actual utilization is not clear to us in studying the data. We are making the assumption that they were fluid.

Q. Dr. Brown, for one reason or another—and it is not important to state here why—you did not go into the territories and investigate the use of that milk, did you?

A. In part, but not to the extent that we can say that it was 100 percent fluid.

Q. Not to the extent that you can say that your state-

ment is factually accurate. Is is only your judgment [13,429] of the matter, isn't that right?

A. That is what I said.

Q. You are going to give me these figures after recess so we will leave that.

Calling your attention to Figure 4 of Exhibit 180, Doctor, I see in Northern New Jersey you only have plants placed upon that map which are designated "Reserve Order 27 plants Approved to Ship Milk into New Jersey."

You do not mean to indicate, do you, that there are no non-pool plants approved to ship milk into New Jersey in this same territory?

A. Not at all. We have a summary of the number of those plants with health approval that appear on Table 5 of Exhibit 180.

Q. Let us go to Table 5 then. Let me ask you whether or not you know how many of the 387 plants—the 387 plants are the ones that have health approval, the total, is that right?

A. Yes.

Q. What figure represents the ones located in the 13 counties in Northern New Jersey?

A. The 179.

Q. The 179?

A. Yes.

Q. Did you investigate to see how many of those [13,430] plants have facilities for handling surplus milk?

A. There is one such plant in Ocean County, four in Essex, one in Middlesex, one in Passaic and one in Union.

. . . . .

[13,786] EMER C. FLOUNDERS was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. McCABE:

Q. Mr. Flounders, will you give your full name and address, please?

A. My name is Emer C. Flounders. My residence is 3781 Woodland Avenue, Drexel, Pennsylvania.

Q. Have you a statement to present at this hearing?

A. I have.

Q. Would you please read the statement.

A. My statement is on behalf of the South Jersey Milk Dealers Association.

My name is Emer C. Flounders. I am employed by Abbotts Dairies, Inc., Philadelphia, Pennsylvania, having plants at Audubon, New Jersey and Atlantic City, New Jersey, and am appearing here on behalf of the South Jersey Milk Dealers Association. That Association consists of 56 milk dealers from Mercer and Burlington Counties southward in New Jersey who handle approximately 85 percent of the total [13,787] fluid milk sales in the area commonly known as South Jersey. A list of the members of the Association is attached hereto.

* * * * *

[13,789] The following handlers presently deliver milk and other Class I products in Ocean County south of Cedar Creek and have no deliveries in Ocean County north of Cedar Creek:

Abbotts Dairies, Incorporated, Millside Farms, Incorporated, Supplee-Wills-Jones Milk Company, Kligerman [13,790] Dairies, Incorporated. Sylvan Seal delivers milk in Ocean County, south of Cedar Creek and has only one route in Ocean County that extends north of Cedar Creek.

The business which each of these dealers does in Ocean

County south of Cedar Creek is very small relative to their total business in other portions of South Jersey. It is impractical for a milk dealer to subject himself to regulation for all of his sales when only a relatively small portion of his total sales is actually within the marketing area.

Although there are other dealers who deliver in Ocean County south of Cedar Creek, those other dealers will be regulated handlers by reason of their substantial other business in the proposed Northern New Jersey milk marketing area.

It should be noted that there is no milk processing plant in Ocean County south of our proposed dividing line. The five dealers specifically mentioned above as being subject to loss of business if all of Ocean County is placed in the North Jersey marketing area have their processing plants located as follows:

| | |
|---|---|
| Sylvan Seal | Philadelphia |
| Abbotts Dairies, Inc. | Atlantic City |
| Supplee-Wills-Jones Milk Co. | Camden |
| Millside Farms, Inc. | Riverside |
| [13,791] Kligerman Dairies, Inc. | Atlantic City. |

* * * * *

[13,993] By Mr. LENT:

Q. Mr. Flounders, I believe you said, in answer to some earlier questions, that this testimony was prepared sometime ago. Is that right?

A. That is correct, sir.

Q. Was that before the supplemental hearing notice on which we are now proceeding was issued?

A. That is correct, sir.

Q. Then in preparing this testimony you did not take into account the effect of the proposals in the supplemental hearing notice, did you?

A. I gather you are referring to the——

Well, no.

[13,994] Your question—The answer to your question is yes; that is correct.

Q. Yes, you did not take them into account?

A. That is right, sir.

Q. Of course, Item 7 of the supplemental hearing notice relates to certain modifications of the pricing of the milk which the handlers you represent would sell in the south end of Ocean County if the order were issued to include all of Ocean County?

A. That is correct.

Q. You have not studied the effect of that on the price position of your handlers, have you?

A. I have recently been made aware of that, and I take it that you are referring to a change from the present provisions of Order 27 for compensatory payments.

Q. That is right.

A. Having been made aware of the proposals for compensatory payments, I would like to change our statement to some extent, particularly the last sentence of the statement, which was contained on Page 6.

The sentence is as follows :

> "If this were done it would drive out the dealers who are presently supplying most of the milk in the area."

I would like that sentence to be stricken from [13,995] our statement.

Q. That is all I wanted to ask you about.

Examiner HYDE: Anything else? Any other cross-examination of Mr. Flounders?

The WITNESS: I would like to say this, however, sir, that that does not change our position on the fact that—that the extent of the marketing area should be judged by the proper standards of whether or not it should be a part of that marketing area or not. And, in our opinion and for the reasons I have made in our statement, we do not believe that it should be a part of any marketing area for north Jersey.

By Mr. LENT:

Q. Well, I understand that, Mr. Flounders. The only thing is you realize, from your own prepared testimony—particularly at the top of Page 2, where you give the definition of the line to be drawn across Ocean County—that that would complicate the order much more from a drafting standpoint than simply saying Ocean County, do you not?

A. Yes. But from an operations standpoint in the years in which this is going to be in effect, we feel that that would be a much easier line to regulate because it is a line where there is the least crossing of routes of handlers in the marketing area and handlers not in the marketing area.

Q. Well——

A. And also it is a line where there is very little [13,996] population or anything else.

Q. I understand that. I have been down there. But the harm in including the whole county, aside from it violating your sense of what a proper definition of marketing area is, is after all a matter of pricing. People can manage their businesses if they have got proper pricing, can they not?

A. If they have proper pricing and if the provisions as they have been outlined in this amended proposal, that would alleviate a lot of the conditions that I referred to.

Mr. LENT: That is all.

Examiner HYDE: Now, Mr. Winton.

By Mr. WINTON:

Q. Just a clarifying question.

Examiner HYDE: One clarifying question for Mr. Winton, and then Mr. Ware.

By Mr. WINTON:

Q. In addition to the statement which you removed at the end of your prepared statement, there are similar statements in two other places: one on Page 4, in the middle,

where you say "Thus, in October of 1955 60 percent of all sales in the southern part of Ocean County were made by dealers who would be forced to retire from that market if the proposed north Jersey area is extended south of Cedar Creek in Ocean County."

[13,997] Do you wish to take that statement out, too, that part about being forced to retire if the area was extended south of Cedar Creek?

A. Well, certainly, as I removed the other statement, they—I agree that under the proposals as made, which we certainly have no assurance will be adopted, if those proposals are put in they would not be forced to retire.

However, I would like to say this, that we cannot speak of these marketing areas in a vacuum. This is not the end of everything. There are proposals in for federal regulation of south Jersey. And certainly in our opinion that portion of Ocean County that we are referring to here is a part of the south Jersey market and should be a part of the marketing area for any order for south Jersey, and not a part of the marketing area for any order for north Jersey.

Examiner HYDE: Anything else, Mr. Winton?

By Mr. WINTON:

Q. These same modifications in your statement would also be applicable, would they not, to the following, which appears at Page 3 of your prepared statement:

> "It is impractical for a milk dealer to subject himself to regulation for all of his sales when only a relatively small portion of his total sales is within the marketing area."?

That, too, would be subject to the qualification that it [13,998] depends on the pricing, and that the hearing notice proposals which have been called to your attention affect the conclusion?

A. No, sir.

Q. Is it not?

A. No sir, that statement is not affected by the——

Q. If the——

A. —proposals that have been called to my attention.

Q. If the pricing were right would you have any problems?

A. Yes, sir, we would.

Q. Why would you have a problem if the pricing were right?

Col. DANIELS: Now, if the Hearing Officer please, that is repetitious. That was gone into thoroughly before, all about the pricing, the various kinds of pricing under Order 61, and the 10 percent, and all the questions concerning that.

Mr. WINTON: That is not what I am asking about. I am asking about pricing such as is contained in Item 7 of the supplemental hearing notice.

Examiner HYDE: You may answer.

The WITNESS: That statement refers to subjecting himself to regulation for all of his sales. That implies much more than what you are talking about.

And we would certainly be very much opposed to [13,999] being forced to subject ourselves to full regulation for the sake of the portion of the business which we had—the portion of our total business which we had in southern Ocean County.

If we were so forced to subject ourselves to full regulation, it would very definitely drive us out of business in that portion of Ocean County.

By Mr. WINTON:

Q. Even though the pricing were proper?

A. Regardless of the price, irregardless of the price, sir.

Q. Would you explain why, if the pricing were proper, you would go out of business?

A. I said we would—It would drive us out of business

in that portion of Ocean County. I did not say that we would close our shops and steal away. We would remain in business, but we would not be in business there.

The reason is that that would affect our producer pricing, for one thing. Our milkshed is not the same as the milksheds for the other handlers, the other regulated handlers. And, therefore, we might be placed at a very definite disadvantage in our procurement.

Also there is the question of the cost of regulation and many other factors in the order, that go far beyond the considerations that I was giving thought to when [14,000] I made my answers to Mr. Lent.

Mr. WINTON: That is all.

Examiner HYDE: Now, Mr. Ware.

By Mr. WARE:

Q. Mr. Flounders, your testimony as I understand it has been directed exclusively to where you think the marketing area boundary should be in Ocean County. And I believe you said that your association had no particular interest in other parts of the proposed boundary. Does that mean that the members have no distribution in the other counties?

A. There are some members who have distribution in other areas, in other portions which will be brought under regulation.

But the members who do have are so much involved that they are going to be regulated anyway, and we have taken no position on anything which is included within the call of the hearing except this lower portion of Ocean County.

Q. You made reference at one point to the fact that Sylvan Seal, who has distribution in Ocean County south of Cedar Creek, does have one route that runs north of Cedar Creek. Can you give us any information as to how substantial that portion is that is north of Cedar Creek——

A. No, sir.

Q. —relative to the portion that is south?

[14,001] A. I cannot, sir. The information was obtained from a questionnaire. We asked those—The questionnaire asked the question "The volume of the business south of Cedar Creek" and whether or not they had any business beyond that line, and the Sylvan Seal Company answered that they did to the extent of one route, with no indication of volume. I am sorry.

* * * * *

[14,043] Q. These secondary markets have not all been included in the marketing area that you propose for extension.

A. If you are meaning Connecticut and Pennsylvania areas, they have not been included in the hearing notice, that is right.

Q. In point of fact, from an economic viewpoint, isn't Fairfield County, Connecticut, just as much a part of the New York City metropolitan area as North Jersey?

A. It is not included in the hearing notice, and whatever my answer might be it would not be of any import.

Q. I am not asking that it be included. I am merely pointing out that it has just as much justification for drawing on the New York City milkshed as other parts of the New York City metropolitan area, isn't that correct?

A. We hope that all markets draw on this milkshed for their supply.

Q. It has as much right to draw on the New York City milkshed as Syracuse.

A. Certainly.

Q. If shipping plants in the past have served such areas as well as Order 27 and maintained a pool shipping status, because under the rules of the order that was [14,044] economically the most efficient way for them to operate, why should they be penalized in the future when you are going to change the rules?

A. Again, I don't like this word "penalize". Let us go back to the type of thing they have been doing. I pointed out in my statement on need for regulation of

the North Jersey area and need for certain amendments to Order 27 that one of the disorderly practices in the milkshed is the movement of shipping plants in and out of the pool and the movement of producers in and out of the pool on a contraseasonal basis to serve these markets that we are discussing. That is one of the types of practices we propose to correct in part with amendments to pool plant rules.

The condition we have had has been that Order 27 producers have carried the burden of surplus for those markets, and because of this contraseasonal movement of shipping plants and of producers Order 27 producers have not shared the fluid market.

Q. Does that complete your answer?

A. Yes.

Q. Wouldn't that disorderly practice be cured just as much if these became designated plants as if they purport to be shipping plants?

A. I don't know that that would make any difference either way on the program I am pointing out.

[14,045] Q. Let me ask you this question: As an economist, you know that under your proposal for shipping plants the economics of being a shipping plant are going to be very different because there will be compulsory pooling in months, other than the flush months, if 60 percent of the receipts were used in Classes 1-A and 1-B, regardless of the amount that is shipped into the marketing. That is correct, isn't it?

A. That is the proposed amendment we are offering to Section 927.27 of Exhibit 86.

Q. Didn't these shipping plants elect that status in the past largely to serve outside markets for fluid milk?

A. I am not sure of their motives, but I can point out that the results of the types of operations carried on were injurious to pool producers, to the regular pool producers associated with the regularly designated pool plants by means of Sections 927.20 through 927.22.

Q. So that the people here will not get an erroneous

impression, how much difference per hundredweight do you think it might have made if this abuse alleged had been corrected in the past?

A. It depends on the method of calculation.

Q. What is your best estimate?

A. I was going to point out two alternative methods methods of calculation on it. The calculations that I have [14,046] made would show the effect on the annual blend price to be something less than 1 cent. There is data in Table 2 of Exhibit 164 that shows the effect on the utilization factor of Order 27, and multiplying that difference in the utilization factor by the base price the effect will be somewhat greater.

Q. Doctor, as an expert familiar with marketing prices, which you have had the occasion to study, would you tell me whether, in your opinion, if the rules which you now propose had been in effect, say, for the last five years for shipping plants, you would have the same alignment of designated and shipping plants which you have today?

A. May I have that question read again, please?

Examiner HYDE: The Reporter will read the question.

(The pending question was read by the Reporter.)

The WITNESS: I don't know what the alignment would have been, but had these proposed rules been in effect over the past five years I am sure that disorderly practices as we point out would not have developed to the point that they have developed.

By Mr. WINTON:

Q. Isn't that another way of saying that had the rules for shipping plants in the last five years been what you now propose them to be there would be very many fewer shipping plants and more designated plants?

[14,047] A. I doubt if there would have been more designated plants. I am sure some of the plants that are now shipping plants would not be under the order at all, but

would be unregulated plants associated with the Connecticut market, for example, or the Pennsylvania market.

Q. Or they may have been designated plants. I will go into that a little more fully tomorrow.

We are pretty much at the end of the day now.

Mr. DURBIN: May I ask a question?

Examiner HYDE: Mr. Durbin.

Mr. DURBIN: In making the last two answers to Mr. Winton's questions, were you also taking your proposed extension of the marketing area, or were you looking at it as though the marketing area would be the same as it now is under Order 27?

Mr. WINTON: That was my question, incidentally.

If the shipping rules had been that you had to mandatorily pool in any month when you shipped outside of Class I, say 1-C, up to 60 percent, if you had to mandatorily pool would you have had as many shipping plants?

The WITNESS: There was another part of your question that wasn't quite clear to me, and I will answer them both at the same time, Mr. Durbin.

In your questioning were you meaning our proposal for permanent designation?

[14,048] By Mr. WINTON:

Q. No, assuming there were no limit to becoming a designated plant, but if you remained a shipping plant you would be mandatorily pooled when you went out to serve outside markets.

A. Under the assumptions you now give of the existing designated pool plant rules and our proposed amendment to shipping plant rules, and with the additional areas regulated as part of Order 27, I would hold the opinion that many of the plants that have operated as shipping plants would have operated as permanent pool plants, while others would have chosen to become unregulated plants to serve the Connecticut and Pennsylvania mar-

kets. I don't know how much would break one way or how much would break the other.

Q. Bearing that in mind, now that you propose a drastic change in these rules, wouldn't it be more appropriate to give the operator of these plants to make that choice now, in the light of the new rules, rather than to try to saddle them with additional responsibilities because of the way they made their choice under the old rule?

* * * * *

[14,166] Q. And one other question.

Inasmuch as you mentioned your proposals as changes in Order 27 or changes in the existing provisions of Order 27, I assume that those were the only provisions of Order 27 that you felt needed major change.

A. That is a very broad statement. I——

Q. Well, maybe we can put it in the negative.

Have you any other major changes to suggest in the provisions of Order 27?

A. I would like to put it this way, Mr. Lent, that the responsibility for proposing these changes in Order 27 and for suggesting the establishment of a single order is the responsibility of, as far as I am concerned, the Dairymen's League, Mutual and the bargaining agency. And I have left it to them.

I cannot accept them or deny them.

What it seems to me I want to see is what the [14,167] Secretary finds as a result of this hearing, and it is have a chance to find out what that means to New Jersey producers.

The only direct exception I would take to Dr. Brown's presentation is in the application of the direct-delivery differentials. But, so far as I know, I take no other issue with Dr. Brown.

Q. Well, Dr. Brown has not exactly said yet on the witness-stand—although I think he will before he gets through—that he has no other changes to suggest in Order 27. He thinks the provisions of it are a framework in which the

new single order could be set up, if there is to be a single order.

A. That is right.

I did——

Q. And inasmuch as he had not said that yet, I could not very well ask you to endorse his statement.

A. That is right. I——

Q. So I had to ask you——

Mr. POLIKOFF: Objection.

Examiner HYDE: I have got an objection over here.

Mr. LENT: What are you objecting to?

Mr. POLIKOFF: I object to the phrasing of the question because it implies that Dr. Brown's proposals merely relate to changes in Order No. 27. As a matter of fact, some of the proposals are so drastic that they cannot be [14,168] characterized as a change at all but as a complete innovation, as distinguished from a change.

Mr. LENT: Well, there was no question pending. So I do not know where we are.

Examiner HYDE: You were making a statement, and——

Mr. LENT: I was making a statement as preliminary to a question. I had not asked the question.

Examiner HYDE: Go ahead with your question.

By Mr. LENT:

Q. I was trying to explain to Mr. Wescott what I was getting at, and then I was going to ask the question.

You are stating what you think ought to go in a single order, and you stated it under certain headings. There are other things that have to go in an order to make a complete order and make it work, and I take it that at this time at least you are relying on the other provisions of Order 27 as the framework to fill in between what you have specifically stated.

A. That is right.

I think I did propose consideration of one thing which Dr. Brown will not propose consideration of.

Q. Yes?

A. That is the peripheral plant problem which I think, I must say, is a real problem and deserves sober consideration by every group.

[14,169] Q. I think you proposed one other, and that was the abolition of the seasonal factor in the Class 1-A formula.

A. That is right.

Mr. LENT: That is all.

Examiner HYDE: Colonel Daniels.

By Col. DANIELS:

Q. In your testimony, Dr. Wescott, speaking of the peripheral milk, you suggested that the testimony as stated by Dr. Pierce was pretty much what you stood on. But I understood you to say that it should apply to only retail milk sold on routes. And, as I remember Dr. Pierce's testimony, he suggested any packaged milk that was sold on routes which may go to a store or a home.

Are you departing from what Dr. Pierce said, or did you not mean to limit this distribution to the retail milk only?

A. I purposefully departed from the testimony as Dr. Pierce finally gave it under cross-examination.

I believe that you will find a tendency to move more and more packaged milk directly into stores from some distance, and it creates—It does not refer in that way to this problem of the peripheral plant——

Q. Well——

A. May I finish?

Examiner HYDE: Let him finish his answer.

[14,170] The WITNESS: The plant I am thinking of is the plant along the border of south Jersey markets which has a retail distribution running from its plant over into the marketing area, and always has had.

To force that plant either into the pool or out of the market would do some violence and raise the problem of

the pressures to extend the market area farther and farther.

And I believe that such a provision as Dr. Pierce proposed could accommodate that kind of plant, which are pretty high utilization plants anyway, and not disrupt the pool at all.

By Col. DANIELS:

Q. Well, Doctor, I agree with that. But why do you exclude milk if it is sold to stores, dropping of 10, 12, 25 quarts of milk across either the State line or the area line? Why should that force the dealer into the order or require compensatory payments so long as he stays below the percentage? And if he drops it off retail to homes, it just does not require him either to get in the pool or pay compensatory payments. I do not get the distinction.

A. Well, I think the distinction is this: we are perfectly aware of the tendency for the store outlets to become larger and larger, and the tendency to service those with packaged milk often coming at considerable distances. [14,171] And it comes from plants which in no way present the same problem that the peripheral plant I was speaking of presents.

I think that if possibly some provision could be made in that regulation to account for store deliveries from a basically retail route——

But I think the judgment should be routes, retail routes originating at the bottling plant to avoid the exemption from the pool of distant plants that may want to ship packaged milk into the marketing area for the large-store operations. Those would have to be excluded. Otherwise your pool would not be able to accept that kind of a situation.

[14,172] Q. Well, are you willing then to modify your statement by saying that if the wholesale route originates from a plant located outside of the area, and that whole-

sale route deliveries [sic] milk to various stores, and stays under the percentage that you have in mind, that such a plant should not be required either to join the pool or make compensatory payments?

A. No, I couldn't accept that. It has to be a retail route, it has to be—it can only affect and concern itself with these existing plants on the edge of the market area which have had these, historically, these retail distributions directly from their bottling plant back and forth over this line, the central New Jersey line.

Q. But those southern New Jersey dealers and also some dealers without the State of New Jersey, have had a long history of packaging milk at their plants and delivering it both retail and some to stores; isn't that true?

A. Yes; but that—that is a sort of business which is going to grow, it is the sort of business which is going to become more and more of a problem, the sort of business which can involve plants many, many miles from the market. And I just don't see how it is conceivably possible to maintain the pool and exempt plants in operations such as that from the pooling provisions.

Q. All right, now, Dr. Wescott, will you tell me [14,173] what purpose you are attempting to serve, or what object you are hoping to attain, by requiring plants to sell milk from retail and wholesale routes in the area in packaged form, but not in sufficient amount to be pool plants, in requiring compensatory payments of them—what do you hope to obtain, and what is your purpose?

A. Well, I think the application of compensatory payments is the only basis on which a market pool can exist. A market pool can't exist without compensatory payments.

Q. When you speak of compensatory payments, are you speaking of the compensatory payments as in the amounts that they are set up now in Order 27, as the type that you have proposed for the separate order?

A. I don't believe that I am knowledgeable enough to make a judgment on the adequacy or inadequacy of the

compensatory payments as now established. I believe there is testimony——

Q. Well, you——

A. —in the record to justify them as they are.

The Secretary certainly promulgated an order based on that, and I am perfectly prepared to accept them.

Q. Well, I am not arguing with you about compensatory payments, I am not going to argue with you about anything.

All I want to know is, when you use the term "compensatory payment," what you are talking about? Maybe [14,174] you are talking about 10 cents?

A. No, I'm talking about the compensatory payments as they are currently in Order 27.

Q. That is all I asked.

I now ask you, Doctor: Is it your purpose in recommending compensatory payments to keep cheap milk out of the market, or is it your purpose to have an order drawn that will guarantee the local producer the sales in New Jersey, under heavy penalty on the part of someone else if they try to come in and sell?

A. I certainly am not going to argue the merits or demerits of location differentials.

Q. I am not arguing location differentials.

A. As a producer of nearby milk, I would be very, very happy to see all milk distributed in handler pools, but if there are no—failing a handler pool order, I don't believe that any order on a market pool basis can exist without location—without compensatory payments.

Q. Well, I asked you is it the purpose to keep cheap milk out of the area?

A. The purpose is to make a market pool work.

Q. Well, there are market pools that don't have compensatory payments, aren't there?

A. I don't know that there are, or are not, I would not be sure.

[14,175] Q. Why wouldn't it work, why wouldn't a market-wide pool work without compensatory payments?

A. Well, one has to be able to determine which plants are pools and which ones aren't. And if the plant isn't pooled, and is allowed to have sales in the market, then obviously your market pool cannot work.

Q. It isn't that obvious to me. Why? You tell me the facts. What would happen, and what facts have you examined that lead to that conclusion?

A. Well, I think it is fairly obvious, if one takes a look at how a market pool is set up, how the milk is pooled, how the milk is distributed, how the surpluses are allocated to the people included in the pool, that there has to be a basis of determining who is in the pool and who is not in the pool.

And unless there are compensatory payments there is no pool. I just don't see—in my opinion I would say this: that there can be no market pool without compensatory payments in any area such as this.

Q. If the handler who brings milk into the area and sells it as Class I-A can establish that he has paid as much for the milk or more than he would have to pay under the Order, will you then tell me why the market-wide pool would not work for the others?

A. Because——

[14,176] Q. And—just a minute, please.

And how he is disrupting the market by bringing in cheap milk?

A. If you allowed that to happen, you wouldn't have a market pool, you would have a handler pool. It's quite simple.

And I think you—you just don't—you can't have a handler pool and have a market pool at the same time, or vice versa.

Q. Have you studied the orders where they have market-wide pools and where they have handler pools, federal orders, and when one handler moves into the other area and sells milk, he does not have to pay compensatory payments or join the pool—have you looked at those orders and studied those situations?

A. No, I have not.

Q. Did you know they existed?

A. I presume they could very well exist in other areas and under other circumstances.

Certainly we in this area have a particular and peculiar set of problems.

Q. All right, let me ask you this: If two or three dealers from southern New Jersey, or two or three dealers from eastern Pennsylvania, sold milk in the new marketing area, and could establish—take that premise—that they [14,177] paid for that milk, and actually, and not through any subterfuge, a price equal to or more than they would have had to pay under the order, why wouldn't a market-wide pool work for all the New Jersey dealers that complied with the pool provisions?

A. Well, if you would extend it into those plants, you would have to extend it into plants lying in New Jersey and Sullivan County and Orange County; and as long as they paid their producers more than the pool return, they could operate on a handler basis, and your pool would get lower and lower, the blend would get lower and lower. You would have no handler pool. That seems to me very simple,—or no market pool, I mean.

* * * * *

[14,245] Q. The recommendation I would like to discuss with you is the recommendation for a tight pool. In general that follows the philosophy which underlay the separate-order proposals, does it not? That was a basic principle for the separate-order proposal, and that has been pretty fully explored?

A. Yes.

I think the case that we believe most strongly is that an order controlling the fluid milk supply of a market should concern itself with fluid milk.

Q. In general you have approved Dr. Brown's testimony. I do not know whether you had the opportunity to hear

the cross-examination, where certain hardship cases were [14,246] brought to his attention.

A. I would not say that in general I have approved Dr. Brown's testimony. I said that the three New York groups undertook to prevent testimony in support of this. All I said is that the pool must be a tight one, and that Dr. Brown's proposals are minimum and should not be weakened. I did not go into them; I did not testify in detail to them. I cannot.

Q. But did you have occasion to hear the hardship cases I brought to Dr. Brown's attention?"

A. No. However, if there are hardship cases and testimony put in the record to that effect, the Secretary would take cognizance. It certainly will do no good for me to take cognizance of it.

Q. Well, you have said that in your opinion the proposals put in the record by Dr. Brown accomplish it. That is, your purpose of having a tight pool. And then you added "They must not be weakened."

Do you mean that any modification of those proposals to take care of hardship cases and provide for those who have been historically associated in the true sense with the marketing area of the enlarged pool should not be permitted by the Secretary?

A. I think a general question like that is one I could not answer. I think every one of those things has to [14,247] be judged on its merit, and I think someone else can do it, and not myself.

I do not exclude consideration certainly of adjustments.

Q. That is what I wanted to get at. You are not opposing them without having heard the case? If the situations require relief you do not want to be understood by your statement as saying that the present proposals in the supplemental notice must not be weakened if there is——

A. Well, I do not think they must be weakened. I do not believe that concessions for hardship cases necessarily weaken them.

Q. Fine.

Now there is one other problem which the New Jersey producers and the dealers I represent have never seen eye to eye on, and I just want to explore some of the underlying facts with reference to it. I know our opinions are different, and I am not going to go into opinions, but just into the facts. And that is the elimination of Class 1-C milk.

Now you have made recommendations under peripheral milk which are designed to help the unregulated handler who comes into the marketing area. Is that not correct?

A. I said the Secretary should take cognizance of the testimony put in by Dr. Pierce.

[14,248] Q. The situation under consideration in the case of peripheral milk is the case of an unregulated handler outside of the marketing area who has some business in the marketing area, and you say that certain provisions should be put in our regulation so that he can remain unregulated as to his outside business and operate within the marketing area on the same basis as a regulated handler. Is that not basically what the intention of those proposals is?

A. I suppose there are few subjects on which I have talked more or more vehemently than on 1-C milk. And I do not think there is any subject you could pursue with me that would be less fruitful.

There is, in my estimation, absolutely no justification for 1-C milk in any order, in any place, at any time. That is my opinion and belief, and certainly it is not going to do any good to ask me questions about it.

Q. I knew your opinion in advance.

A. That is right.

Q. And that is why I made that preliminary statement, that I was not going to question you about your opinion.

I think your opinion is well known by everybody here or who will read this record.

But I did want to get certain factual matters.

Mr. DURBIN: I object.

Now there is no reason for counsel to go through

[14,249] all of that explanation. He is here on cross-examination, asking, trying to get facts.

Examiner HYDE: Well, we have gone through it. Now let us get down to business.

Mr. WINTON: Well, there was one question still unanswered.

Examiner HYDE: What is the question?

By Mr. WINTON:

Q. The question was this:

Is not the intention behind the proposal which you have supported for peripheral milk to permit a handler to remain unregulated, essentially, who is outside the market but who has some business in the market on which he will be put on a plane of equality to a certain extent by the special provisions in the marketing order for such a handler?

A. That is right.

Q. That being so, would you explain why a handler regulated by the order, who has some business in the unregulated area, should not be put on the same basis as the unregulated handler as to the business in the unregulated area?

A. If a situation exists that is economically to his disadvantage in those unregulated areas, the only solution is to get regulation in those areas and not to have an order [14,250] which prices milk used for the same purpose at two different prices and returns farmers two different prices for milk used for the same purposes.

1-C regulation can only maintain and perpetuate and worsen, as it has in this market, producer relationships, handler relationships, and lead to a general deterioration.

In my opinion, if 1-C milk had never been put in Order 27 we would have had this situation resolved and settled amicably and well years ago.

When you put in any provision as iniquitous and as obviously unjustifiable as 1-C milk, you are in trouble to begin with. And I certainly cannot concede any argument in favor of it.

Now that again is a very categorical statement, but I do not suppose there is any subject I feel more strongly on.

Q. I know that, Doctor. I want to get to the other thing: Then why should you have any special provision which will give the unregulated handler this special exemption with compensatory payments as presently provided under Order 27 when his problem could be solved within the framework of existing Order 27 by bringing regulation, even by a separate order, to south Jersey when there are perfectly fair provisions under Order 27 which will put him on the [14,251] same basis as an Order 27 handler?

Col. DANIELS: I object to the question.

Dr. Wescott has testified that this is a philosophy of his and that he relies upon the testimony of Dr. Pierce for the factual basis and the reasoning of the problem. And Dr. Pierce was thoroughly cross-examined on it.

I do not believe that because a man takes the witness-stand who announces a certain philosophy and then says that the facts concerning that and the development of that are those of another witness—I do not believe he should be cross-examined on that other witness' testimony.

This is a philosophy, and he stands strongly on it, and nobody is going to change it if we are here next year until this time.

Mr. WINTON: In the first place, the Colonel has brought in this question of this witness claiming that Dr. Pierce had testified to the underlying facts as to this philosophy. I do not believe the record of the proceeding this morning will bear out any basis for that.

Examiner HYDE: Well, I do think this is true, that this witness has indicated he is not here to give facts on this point; he is here to tell you that he has got an underlying, deep-bedded feeling on it, and that, no matter how long you work on it, he is not going to change it.

[14,252] Col. DANIELS: But you did say, sir——

Mr. WINTON: But the Colonel has been objecting—and perhaps it has not been made clear to the Presiding Officer—not to asking the witness about 1-C in which he gen-

erally favors the provision I have taken, but to the fact that I am trying to point out to the witness that the witness has made certain unwarranted concessions to unregulated handlers coming into our market on compensatory payments. And I do not believe that the doctor has nearly as strong a philosophy on that subject.

* * * * *

[14,562] Mr. WILES: Mr. Hearing Master, I hand you five copies of a page that has the caption Table 1 (Revised) Health Approved Supplies Of Fluid Milk by Source For Northern New Jersey Consumers, 1955, and I would request that it be marked Exhibit 180-A, if you could do so, because it is supplementary to that original page, but I have no objection to any other marking.

Mr. WINTON: I think if you mark it a new number [14,563] it would be easier to say that it is to be taken in lieu of.

Examiner HYDE: We will mark the document Exhibit 192 for identification.

(Exhibit No. 192 was marked for identification.)

Mr. WILES: Mr. Hearing Master, I hand you five copies of a proposed exhibit for identification containing three pages, which has a caption Table 2 (Revised) Sources of Milk Used in Northern New Jersey March, June, August, November 1955 & March, June 1956.

Examiner HYDE: The document is marked Exhibit 193 for identification.

(Exhibit No. 193 was marked for identification.)

By Mr. WILES:

Q. Dr. Brown, I show you Exhibit No. 192 for identification, and I wonder if you would explain in the record what that purports to be.

A. Exhibit 192 is the alternative to Table 1 of Exhibit 180 that was developed at the suggestion of interested parties in this hearing. The explanation for this particular

table, as I recall, was developed in cross-examination with Colonel Daniels. It grew out of the problem of interpretation of a certain volume of milk shown in the bottom line of [14,564] Table 3 of Exhibit 164.

Q. For purposes of the record, would it be appropriate for interested persons to view Exhibit 192 with the first page of 180 and consider it supplemental thereto?

A. Yes.

Q. Was this table and the material contained in Exhibit 192 prepared in the same fashion as the material contained in Exhibit 180?

A. Yes, it was developed under my supervision.

Q. Dr. Brown, I hand you a copy of Exhibit No. 193 for identification and I wonder if you would explain in the record what that purports to be.

A. Table 2 (Revised), which is Exhibit 193, is an alternative table to Table 2 of Exhibit 180. It was developed in like manner to Exhibit 192, as was requested and suggested by interested parties in the hearing. Its explanation was made on cross-examination and statements, with Colonel Daniels as the interrogator. Again, it was developed to handle the problem of interpretation of certain statistical data shown in Table 3 of Exhibit 164.

Q. Similarly, Dr. Brown, is that material contained in the three-page exhibit numbered 193 for identification well to be considered supplemental to the corresponding copies of Exhibit 180?

A. Yes, and it was also developed under my supervision.

[14,565] Mr. WILES: Mr. Hearing Master, I offer Exhibits 192 and 193 in evidence.

Examiner HYDE: Have you any question as to the admissibility of Exhibit 192?

Mr. LAWRENCE: Has Exhibit 180 been received in evidence?

Examiner HYDE: No, Exhibit 180 has not been received in evidence, Mr. Lawrence.

Mr. WINTON: They ought to be passed on together.

Examiner HYDE: I think you are right.

First let us consider Exhibit 180. Are there any questions as to the admissibility of Exhibit 180?

Exhibit 180 is received in evidence.

(Exhibit No. 180 was received in evidence.)

Examiner HYDE: Have you any questions as to the admissibility of Exhibit 192?

Exhibit 192 is received in evidence.

(Exhibit No. 192 was received in evidence.)

Examiner HYDE: Have you any questions as to the admissibility of Exhibit 193?

Exhibit 193 is received in evidence.

(Exhibit No. 193 was received in evidence.)

* * * * *

[14,656] By Mr. LENT:

Q. You say (a) in .66 would remain the same. And when you say that, of course you are allowing for a change in the letter designating the column which would be applicable?

[14,657] A. Yes, sir; the appropriate column.

Q. You don't want the Class 1-A rate to be applicable?

A. I am meaning the appropriate column or columns.

Q. Yes, sir.

A. 927.70 defines the producer settlement fund. We believe that definition or the language there is proper under the present order and the order as we propose it to be amended.

927.71 is the "handler's accounts". We believe that section fits both the present order and the proposed order as amended.

927.72 outlines "payment to the producer settlement fund". We believe it is proper for the order as amended as it is now proper under Order 27.

927.73 outlines "rules for payments out of producer set-

tlement fund". We propose no changes in this section, believing that it fits the amended order.

927.74 "handler's pool debit or credit" and 927.75 "adjustments of errors in payment". We believe that language and the intent of it now under Order 27 proposal fit the order as we are proposing it to be amended.

Q. Eliminating 1-C, of course.

A. Eliminating 1-C wherever it occurs, yes, sir.

927.76 discusses "cooperative payments for market-wide services".

Q. You didn't cover .75 for us.

[14,658] A. I did.

Q. Excuse me.

A. With the .74.

927.76 provides the "rules and regulations for cooperative payments for market-wide services." It is our recommendation and proposal that this entire section be retained as it now is under the order as amended from this hearing, believing that the objectives, purposes and rules now contained in the order properly fit the new situation, and that the need for market-wide services performed in this manner will be even greater than they now are under the order.

927.77 is "cream payments". We propose that this section be retained as it now is under Order 27. We see nothing in the proposed amendments that would cause any change in this section other than a mechanical change in subparagraph (c), so that the first line would read "With respect to Class 2-A milk."

Section 927.78, payments on milk received from dairy farmers at nonpool plants; we propose no change in this particular section, believing that it properly provides for the rules to handle the problem of payments for this milk under Order 27 at the present time and as it would be amended.

The same is true with reference to 927.79, dealing with

payments on milk or milk products, the source of which is not established.

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[14,674] Mr. POLIKOFF: I would like to ask Dr. Brown a couple of questions in connection with the 60-percent rule.
[14,675] Examiner HYDE: All right, Mr. Polikoff.

By Mr. POLIKOFF:

Q. Doctor, am I correct in my recollection that one reason which you gave for your 60 percent rule was that the Class I utilization for the last six months of either 1955 or '56, I forget which year was involved, was very close to 60 percent, something between 57 and 60?

A. The year would be 1956 and the figure that I believe I developed with Colonel Daniels was 57.4 or so percent.

Q. The question which I desire to ask you is, do you recall, or did you consider, the relationship of the presently existing 60 percent clause to the Class I utilization of the pool at the time and immediately prior to the time that the rule was originally adopted in Order 27?

A. We considered that, yes.

Q. To what extent did you consider it? First of all, tell us what it was.

A. I would have to look it up, but I think I can answer your question without that. We considered all of the information we could possibly get that was among the items, and have come up with the proposals we have made with reference to this 60 per cent.

Q. Well, Doctor, will you tell me whether it is not a fact that the Class I utilization during the last six months of the year during which the 60 percent rule was adopted and [14,676] the immediately preceding year were substantially higher than the years 1955 and 1956?

A. I would have to look it up to be sure.

Q. If you remember that you considered it and were able

to answer my question the way you did, then you should have some idea without looking it up.

Mr. LENT: I object to that statement.

Examiner HYDE: I am going to let him look it up.

Mr. LENT: A man may have considered something.

Mr. POLIKOFF: And then forgotten the detail? He should be able to remember the detail.

Examiner HYDE: Let's stop that kind of argument.

The WITNESS: We would have to go back to 1951 to get a utilization above the 57.4 percent that occurred in the last six months of 1956. This is classes 1-A, 1-B and 1-C which is what we are discussing.

By Mr. POLIKOFF:

Q. When was the 60 percent rule adopted?

A. That is the thing I have to look up. It is in exhibit— I don't know. I don't have that information with me.

Q. Well, are you willing to state for this record how you gave consideration to the relationship that existed at that time?

A. I think I have discussed this all I need to and I [14,677] am willing to stand on the record as it is.

Mr. POLIKOFF: I have nothing further.

Examiner HYDE: Anything else? Dr. Brown, did you have a statement that you want to make?

The WITNESS: I do.

All of the opinions and statistical data that I have placed in the record is that of my own opinion and own work but I do want to acknowledge the assistance under my direction in the development of this statistical data, I would like to acknowledge the very fine assistance of George O'Brien, Art Little, Clare Pineo, Chet Smith, and Mrs. Sallie Gray in helping me prepare this material and putting it in as I have indicated.

• • • • •

Table 1 (Revised)

EXHIBIT 192

HEALTH APPROVED SUPPLIES OF FLUID MILK BY SOURCE FOR NORTHERN NEW JERSEY CONSUMERS, 1955

(thousand pounds)

| | Producer Receipts | Fluid Sales in No. N.J. | Order 27 I-A | Fluid Sales Other Areas | Other Uses Non-Fluid |
|---|---|---|---|---|---|
| Produced in N.N.J. & Under OMI Only | 465,734[a] | 262,500 | | | 203,234 |
| Order 27 Plants in N.N.J. | 372,758 | 95,959[b] | 263,097 | | 13,701 |
| " " " " N.Y. State[c] | 1,369,012 | 190,124[b] | 243,126 | 63,346 | 322,667 |
| " " " " Pa.[c] | 451,424 | 80,878[b] | 85,143 | 30,381 | 200,589 |
| Order 61 Plants | 520,375[d] | 10,200[e] | | | |
| Unregulated Sources: | | | | | |
| N. Y. State | 309,452[f] | 286,121[g] | | 20,886[g] | 2,445 |
| Pa. Allentown-Easton Area | 205,944[h] | 27,762[h] | | 120,333[h] | 57,849[h] |
| Pa. Other Plants | 294,450[i] | 244,806[i] | | 46,080[i] | 3,564[i] |
| Other Out of State Unregulated[m] | 83,805[j] | 83,805[j, k] | | | |
| TOTAL | 4,072,954 | 1,282,155[l] | | | |

Sources & Explanatory Notes:

a) Exhibit 164, Table 2.

b) This is Order 27 Class I-C

c) Exhibit 164, Table 6, except for producer receipts which are prorata of total Order 27 receipts according to % that number of plants approved for N.J. are of total Order 27 plants in the State.

d) 28 plants out of 66 Order 61 plants in September. 1956 = 42.4% times 1,227,300 thousand lbs. of milk under Order 61 in 1955.

e) Supplied by letter from Order 61 Market Administrator - bulk sales only.

f) Exhibit 112, Table 5.

g) Exhibit 112 shows 26,720 sales upstate (Table 6) but also 10,405 receipts from other plants and inventory increase. Total of other receipts has been deducted.

h) Exhibit 165, Table 1, sum of March, June, August & November times 3.

i) Exhibit 165, Table 2 " " " " ".

j) Exhibit 164, Table 3, " " " " ". This is not producer receipts but shipments into N.N.J. The sources are Order 61 packaged sales of Class I milk, Class III cream & Skim under Order 27 that may have been recombined into milk in N.N.J., packaged sales from distributors in Rockland and Orange counties, N.Y. and milk shipped from 7 unregulated plants in Maryland & Delaware. Producer receipts data at these latter plants are unavailable.

k) Assumes all other out of state unregulated milk to be fluid sales in N.N.J. To the extent that some of this source of milk is fluid sales to So.N.J. or other than fluid use, the figure 262,500 (line 1) is correspondingly higher & the figure 203,234 (line 1) is correspondingly lower.

l) Exhibit 164, Table 2. m) This Exhibit, Table 2: Sum of March, June, August & November times 3.

(Compiled by Economics Department, Mutual Federation of Independent Cooperatives, Inc. March 1957.

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EXHIBIT 193

Table 2 (Revised)

SOURCES OF MILK USED IN NORTHERN NEW JERSEY
MARCH, JUNE, AUGUST, NOVEMBER 1955 & MARCH, JUNE 1956
(IN MILLION POUNDS)

| | Source | Producer Receipts | % of Total N.N.J. Fluid | Used in Northern New Jersey: Fluid Vol. | Fluid % of Source | Other Uses Vol. | Other Uses % of Source | Shipped to Other States Vol. | Shipped to Other States % of Source | Known to be 0.27 Cl.I-A Vol. | Known to be 0.27 Cl.I-A % of Source | Other Class I Vol. | Other Class I % of Source | Other Uses Vol. | Other Uses % of Source |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| MARCH 1955 | Produced in N.N.J. | 77.2[a] | | | | | | | | | | | | | |
| | Under OMI Only[b] | 43.3 | 24.1 | 26.0 | (60.1) | 13.6 | (31.4) | 3.7 | (8.5) | | | | | | |
| | Under Order 27[b] | 34.0 | 6.1 | 6.6 | (19.5) | | | | | 27.4 | (80.5) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 74.0 | 10.9 | 11.8 | (15.9) | | | | | 21.7 | (29.4) | 3.1 | (4.2) | 37.4 | (50.5) |
| | From Pa.[d] | 35.5 | 4.8 | 5.2 | (14.7) | | | | | 6.7 | (18.8) | 3.0 | (8.5) | 20.6 | (58.0) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 27.7[e] | 24.5 | 26.3[f] | (95.1) | | | | | | | 1.4 | (4.9) | | |
| | In Pa.[g] | 28.0 | 21.6 | 23.2 | (82.8) | | | | | | | 4.1 | (14.8) | .7 | ( 2.4) |
| | In Pa.(Allentown-Easton Area)[h] | 18.2 | 2.2 | 2.3 | (12.8) | | | | | | | 9.5 | (52.1) | 6.4 | (35.1) |
| | Other Out of State | 6.3 | 5.8 | 6.3 | (100) | | | | | | | | | | |
| | TOTAL | 267.0 | 100.0 | 107.7[j] | (40.3) | 13.6 | (5.1) | 3.7 | (1.4) | 55.8[j] | (20.9) | 21.1[j] | (7.9) | 65.1 | (24.4) |
| JUNE 1955 | Produced in N.N.J. | 71.7[a] | | | | | | | | | | | | | |
| | Under OMI Only[b] | 40.8 | 21.3 | 22.3 | (54.7) | 14.6 | (35.8) | 3.9 | (9.5) | | | | | | |
| | Under Order 27[b] | 31.0 | 7.6 | 8.0 | (25.7) | | | | | 23.0 | (74.3) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 83.3 | 11.5 | 12.0 | (14.4) | | | | | 23.1 | (27.7) | 4.4 | (5.3) | 48.8 | (52.6) |
| | From Pa.[d] | 41.1 | 4.4 | 4.6 | (11.1) | | | | | 7.4 | (18.0) | 2.9 | (7.0) | 26.2 | (63.9) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 29.2[e] | 26.9 | 28.1[f] | (96.1) | | | | | | | 1.1 | (3.9) | | |
| | In Pa.[g] | 26.0 | 21.6 | 22.6 | (87.1) | | | | | | | 3.0 | (11.4) | .4 | ( 1.5) |
| | In Pa. (Allentown-Easton Area)[h] | 18.1 | 2.4 | 2.5 | (13.9) | | | | | | | 9.4 | (51.8) | 6.2 | (34.3) |
| | Other Out of State | 4.5[i] | 4.3 | 4.5[c] | (100) | | | | | | | | | | |
| | TOTAL | 274.0 | 100.0 | 104.6[j] | (38.2) | 14.6 | (5.3) | 3.9 | (1.4) | 53.5[j] | (19.5) | 20.8[j] | (7.6) | 76.6 | (28.0) |

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Revised Table 2 (cont'd)

SOURCES OF MILK USED IN NORTHERN NEW JERSEY
MARCH, JUNE, AUGUST, NOVEMBER 1935 & MARCH, JUNE 1936



(In Million Pounds)

| | Source | Producer Receipts | Used in Northern New Jersey: % of Total N.N.J Fluid | Fluid: Vol. | Fluid: % of source | Other Uses: Vol. | Other Uses: % of Vol. Source | Shipped to Other States: Vol. | Shipped to Other States: % of Vol. Source | Known to be 0.27 Cl.I-A: Vol. | Known to be 0.27 Cl.I-A: % of Vol. Source | Other Class I: Vol. | Other Class I: % of Vol. Source | Other Uses: Vol. | Other Uses: % of Vol. Source |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| August 1935 | Produced in N.N.J. | 63.3[a] | | | | | | | | | | | | | |
| | Under GMI Only[b] | 37.2 | 16.3 | 17.9[c] | (48.2) | 15.6[c] | (41.9) | 3.7 | (9.9) | | | | | | |
| | Under Order 27[b] | 26.1 | 9.0 | 9.9 | (37.8) | | | | | 16.2 | (62.2) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 53.0 | 19.9 | 21.9 | (41.3) | | | | | 13.2 | (25.0) | 7.9 | (14.9) | 10.0 | (18.8) |
| | From Pa. | 25.8 | 8.1 | 8.9 | (34.4) | | | | | 4.6 | (17.8) | 3.1 | (11.9) | 9.2 | (35.9) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 20.6[e] | 15.8 | 17.4[f] | (84.3) | | | | | | | 3.2 | (15.7) | | |
| | In Pa.[g] | 23.9 | 17.6 | 19.4 | (81.2) | | | | | | | 4.4 | (18.4) | .1 | ( .4) |
| | In Pa.(Allentown-Easton Area)[h] | 16.4 | 1.5 | 1.6 | ( 9.8) | | | | | | | 11.6 | (70.6) | 3.2 | (19.6) |
| | Other Out of State | 13.0[i] | 11.8 | 13.0[c] | (100) | | | | | | | | | | |
| | TOTAL | 216.0 | 100.0 | 100.0[j] | (51.0) | 15.6 | ( 7.2) | 3.7 | (1.7) | 34.0[j] | (15.7) | 30.2[j] | (14.0) | 22.5 | (10.4) |
| November 1935 | Produced in N.N.J. | 64.0[a] | | | | | | | | | | | | | |
| | Under GMI Only[b] | 36.8 | 21.5 | 22.9[c] | (62.3) | 11.0[c] | (29.9) | 2.9 | (7.8) | | | | | | |
| | Under Order 27[b] | 27.1 | 7.4 | 7.8 | (28.8) | | | | | 19.3 | (71.2) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 57.8 | 18.4 | 19.6 | (33.9) | | | | | 19.5 | (33.7) | 5.5 | ( 9.6) | 13.2 | (22.8) |
| | From Pa.[d] | 30.6 | 10.4 | 11.1 | (36.1) | | | | | 8.5 | (27.9) | 1.8 | ( 6.0) | 9.2 | (30.0) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 23.4[e] | 20.3 | 21.7[f] | (92.9) | | | | | | | 1.7 | ( 7.1) | | |
| | In Pa.[g] | 20.4 | 15.4 | 16.4 | (80.7) | | | | | | | 3.9 | (19.0) | .1 | ( .3) |
| | In Pa. (Allentown-Easton Area)[h] | 15.7 | 2.6 | 2.8 | (17.6) | | | | | | | 9.5 | (60.7) | 3.4 | (21.7) |
| | Other Out of State | 4.2[i] | 3.9 | 4.2[c] | (100) | | | | | | | | | | |
| | TOTAL | 216.0 | 100.0 | 106.5[j] | (49.3) | 11.0 | ( 5.1) | 2.9 | (1.3) | 47.3[j] | (21.9) | 22.4[j] | (10.4) | 25.9 | (12.0) |

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Revised Table 2 (cont'd)

SOURCES OF MILK USED IN NORTHERN NEW JERSEY

MARCH, JUNE, AUGUST, NOVEMBER 1955 & MARCH, JUNE 1956

(In Million Pounds)



| | Source | Producer Receipts | Used in Northern New Jersey: % of Total N.N.J. Fluid | Fluid: Vol. | Fluid: % of Source | Other Uses: Vol. | Other Uses: % of Source | Shipped to Other States: Vol. | Shipped to Other States: % of Source | Known to be 0.27 Cl.I-A: Vol. | Known to be 0.27 Cl.I-A: % of Source | Other Class I: Vol. | Other Class I: % of Source | Other Uses: Vol. | Other Uses: % of Source |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| MARCH 1956 | Produced in N.N.J. | 76.2[a] | | | | | | | | | | | | | |
| | Under OMI Only[b] | 43.8 | 22.6 | 25.7 | (58.7) | 12.4[c] | (28.3) | 5.7 | (13.) | | | | | | |
| | Under Order 27[b] | 32.4 | 8.2 | 9.3 | (28.7) | | | | | 23.1 | (71.3) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 76.1 | 10.5 | 11.9 | (15.6) | | | | | 24.4 | (32.1) | 3.8 | ( 5.0) | 36.0 | (47.3) |
| | From Pa.[d] | 37.8 | 4.2 | 4.8 | (12.7) | | | | | 9.2 | (24.3) | 2.1 | ( 5.6) | 21.7 | (57.4) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 30.3[e] | 25.6 | 29.1[f] | (96.0) | | | | | | | 1.2 | ( 4.0) | | |
| | In Pa.[g] | 28.8 | 21.8 | 24.8 | (86.1) | | | | | | | 3.2 | (11.1) | .8 | ( 2.8) |
| | In Pa. (Allentown-Easton Area)[h] | 19.5 | 2.1 | 2.4 | (12.3) | | | | | | | 10.5 | (53.9) | 6.6 | (33.8) |
| | Other Out of State | 5.7[i] | 5.0 | 5.7[c] | (100) | | | | | | | | | | |
| | TOTAL | 274.4 | 100.0 | 113.7[j] | (41.4) | 12.4 | ( 4.5) | 5.7 | ( 2.1) | 56.7[j] | (20.7) | 20.8[j] | (7.6) | 65.1 | (23.7) |
| | | | | | | * * * * * * * * * * * | | | | | | | | | |
| JUNE 1956 | Produced in N.N.J. | 70.7[a] | | | | | | | | | | | | | |
| | Under OMI Only[b] | 40.4 | 19.7 | 21.8[c] | (53.9) | 12.9[c] | (31.9) | 5.7 | (14.2) | | | | | | |
| | Under Order 27[b] | 30.3 | 9.1 | 10.1 | (33.3) | | | | | 20.2 | (66.7) | | | | |
| | Order 27 Class I-C | | | | | | | | | | | | | | |
| | From N.Y.[d] | 82.3 | 10.4 | 11.5 | (14.0) | | | | | 21.3 | (25.9) | 3.8 | (4.6) | 45.7 | (55.5) |
| | From Pa.[d] | 43.1 | 4.2 | 4.7 | (10.9) | | | | | 10.9 | (25.3) | 3.2 | (7.4) | 24.3 | (56.4) |
| | Unregulated Plants | | | | | | | | | | | | | | |
| | In N.Y.[e] | 31.5[e] | 26.6 | 29.3[f] | (93.0) | | | | | | | 2.2 | (7.0) | | |
| | In Pa.[g] | 29.3 | 21.9 | 24.2 | (82.6) | | | | | | | 3.3 | (11.3) | 1.8 | ( 6.1) |
| | In Pa. (Allentown-Easton Area)[h] | 19.4 | 1.8 | 2.0 | (10.3) | | | | | | | 10.3 | (53.1) | 7.1 | (36.6) |
| | Other Out of State | 7.0[i] | 6.3 | 7.0[c] | (100) | | | | | | | | | | |
| | TOTAL | 283.8 | 100.0 | 110.6 | (39.1) | 12.9 | ( 4.5) | 5.7 | ( 2.0) | 52.4[j] | (18.5) | 22.8[j] | ( 8.0) | 78.9 | (27.9) |

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EXHIBIT 180

Table 1

HEALTH APPROVED SUPPLIES OF FLUID MILK BY SOURCE FOR NORTHERN NEW JERSEY CONSUMERS, 1955

(thousand pounds)

| | Producer Receipts | Fluid Sales in No. N.J. | Order 27 I-A | Fluid Sales Other Areas | Other Uses Non-Fluid |
|---|---|---|---|---|---|
| Produced in N.N.J. & Under CHI Only | 465,734 | 212,034[a] | | | 253,700 |
| Order 27 Plants in N.N.J. | 372,758 | 95,959[b] | 263,097 | | 13,701 |
| " " " " N.Y. State[c] | 1,369,012 | 190,124[b] | 243,126 | 63,346 | 322,667 |
| " " " " Pa.[c] | 451,424 | 80,878[b] | 85,143 | 30,381 | 200,589 |
| Order 61 Plants | 520,375[d] | 10,200[e] | | | |
| Unregulated Sources: | | | | | |
| N.Y. State | 309,452[f] | 286,121[g] | | 20,886[g] | 2,445 |
| Pa. Allentown-Easton Area | 205,944[h] | 27,762[h] | | 120,333[h] | 57,849[h] |
| Pa. Other Plants | 294,450[i] | 244,806[i] | | 46,080[i] | 3,564[i] |
| Other Out of State Unregulated[m] | 134,271[j] | 134,271[j,k] | | | |
| TOTAL | 4,123,420 | 1,282,155[l] | | | |

Sources & Explanatory Notes:

a) Exhibit 112, Table 6.

b) This is Order 27 Class I-C.

c) Exhibit 164, Table 6, except for producer receipts which are prorata of total Order 27 receipts according to % that number of plants approved for N.J. are of total Order 27 plants in the State.

d) 28 plants out of 66 Order 61 plants in Sept. 1956 = 42.4% times 1,227,300 thousand lbs. of milk under Order 61 in 1955.

e) Supplied by letter from Order 61 Market Administrator - bulk sales only.

f) Exhibit 112, Table 5.

g) Exhibit 112 shows 26,720 sales upstate (Table 6) but also 10,405 receipts from other plants and inventory increase. Total of other receipts has been deducted.

h) Exhibit 165, Table 1, sum of March, June, August & November times 3.

i) Exhibit 165, Table 2, " " " " ".

j) Exhibit 164, Table 3, " " " " ". This is not producer receipts but shipments into N.N.J. The sources are Order 61 packaged sales of Class I milk, Class III cream & skim under Order 27 that may have been recombined into milk in N.N.J., packaged sales from distributors in Rockland and Orange counties, N.Y. and milk shipped from 7 unregulated plants in Maryland & Delaware. Producer receipts data at these latter plants are unavailable.

k) Assumes all other out of state unregulated milk to be fluid sales in N.N.J. To the extent that some of this source of milk is fluid sales to So.N.J. or other than fluid use, the figure 212,034(line 1) is correspondingly higher & the figure 253,700(line 1) is correspondingly lower.

l) Exhibit 164, Table 2. m) Exhibit 164, Table 3: Sum of March, June, August & November times 3.

(Compiled by Economics Department, Mutual Federation of Independent Cooperatives, Inc., March 1957)

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TABLE 3

SEASONAL INDEX OF FLUID MILK SALES IN NORTHERN NEW JERSEY, 1955
(Simple Yearly Average = 100)

| | "CMI Only" As Calculated | | N.Y. State Unregulated | | Order 27 Class IC | |
|---|---|---|---|---|---|---|
| 1955 (1) | Pounds (2) | Index (3) | Pounds (4) | Index (5) | Pounds (6) | Index (7) |
| J | 14,572 | 111.15 | 23,889 | 100.19 | 27,324 | 89.55 |
| F | 10,395 | 79.29 | 22,174 | 93.00 | 23,618 | 77.40 |
| M | 11,938 | 91.06 | 26,323 | 110.40 | 23,527 | 77.10 |
| A | 14,546 | 110.95 | 26,402 | 110.73 | 22,474 | 73.65 |
| M | 10,607 | 80.91 | 30,522 | 128.01 | 21,200 | 69.48 |
| J | 11,234 | 85.69 | 28,137 | 118.01 | 24,568 | 80.51 |
| J | 12,346 | 94.17 | 21,651 | 90.81 | 36,850 | 120.76 |
| A | 13,819 | 105.41 | 17,411 | 73.02 | 40,607 | 133.08 |
| S | 14,338 | 109.37 | 21,289 | 89.29 | 31,827 | 104.30 |
| O | 15,173 | 115.74 | 22,276 | 93.43 | 40,122 | 131.49 |
| N | 14,651 | 111.75 | 21,679 | 90.92 | 38,496 | 126.16 |
| D | 13,697 | 104.48 | 24,368 | 102.20 | 35,552 | 116.51 |
| Total | 157,316 | | 286,121 | | 366,165 | |
| S. Av. | 13,110 | 100.00 | 23,843 | 100.00 | 30,514 | 100.00 |

Source: Column 2: Calculated from CMI "Table 1" and Order 27 Market Administrator's Bulletins.
" 4: Exhibit 112, Table 6.
" 6: Order 27 Market Administrator's Bulletin, February 1956.

(Compiled by Mutual Federation of Independent Cooperatives, Inc. March 1957)

Table 4

NORTHERN NEW JERSEY MILK SUPPLY BY KNOWN SOURCES, 1951 - 1955

(million pounds)

| Line | Source | 1951 | 1952 | 1953 | 1954 | 195? |
|---|---|---|---|---|---|---|
| 1 | Total No. N.J. Milk Production | 780.3 | 790.8 | 803.4 | 830.3 | 838. |
| 2 | Total Receipts N.J. Order 27 Plants | 197.6 | 212.2 | 247.4 | 310.4 | 372. |
| 3 | N.J. Producers (OMI only) | 582.7 | 578.6 | 556.0 | 519.9 | 465. |
| 4 | Order 27, IC | 229.0 | 249.0 | 272.4 | 312.3 | 366. |
| 5 | Unregulated N.Y. State | 233.7 | | 255.6 | 293.4 | 309. |
| 6 | Unregulated, Pennsylvania (Est.) | 225.8 | | | 262.7 | 322. |
| 7 | Order 61 bulk milk | | | | 12.0 | 10. |

(index numbers)
1951 = 100

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 | Total No.N.J. Milk Production | 100 | 101.3 | 103.0 | 106.4 | 107.? |
| 2 | Total Receipts N.J. Order 27 Plants | 100 | 107.4 | 125.2 | 157.1 | 188.? |
| 3 | N.J. Producers (OMI only) | 100 | 99.3 | 95.4 | 89.2 | 79.? |
| 4 | Order 27, IC | 100 | 108.7 | 119.0 | 136.4 | 159.? |
| 5 | Unregulated N.Y. State | 100 | | 109.4 | 125.5 | 132.? |
| 6 | Unregulated, Pennsylvania | 100 | | | 116.3 | 142.? |

SOURCES:

Line 1: "Table 1" of monthly statistics published by OMI.
Lines 2 & 4: Reports of Order 27 Market Administrator
Line 5: New York State Department of Agriculture and Markets
Line 6: Penna. Milk Control Commission, estimated from May and November for 1951 and 1954 and March, June, August and November 1955.
Line 7: Letter from L.S. Iverson, Market Administrator, Order 61, to D. D. Brown, Economist, Mutual Federation of Independent Cooperatives, Inc.

(Compiled by Mutual Federation of Independent Cooperatives, Inc.
March 1957)

[14,975] Whereupon, LELAND SPENCER, was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

Examiner HYDE: If I might have your attention, Dr. Spencer, we are glad to have you back with us again. It has been a long time since you first appeared in this proceeding.

You proceed now as you see fit.

The WITNESS: Thank you, Mr. Hyde.

DIRECT EXAMINATION.

The WITNESS: I will first read a short introductory statement which you do not have a copy of.

My name is Leland Spencer. I hold the position of Professor of Marketing in the New York State College of Agriculture, and have occupied that position for more than 30 years. The duties of this position include the teaching of courses in Milk Marketing, supervision of graduate studies, conducting and supervising economic research in the pricing and distribution of milk, preparing reports and publications [14,976] based on such research, speaking on milk marketing subjects, and participation in various conferences and committee work in the same general field. I suppose I might add, participating in hearings of this type.

I am a graduate of Cornell University and hold the degree of B. S. and Ph. D. from that institution.

In addition to my permanent position at Cornell, I have had a number of temporary assignments which provided useful experience in other parts of the United States and abroad. Among the agencies and institutions I have served are:

United States Tariff Commission, 1926.

University of California, 1930-1931.

Joint Legislative Committee to Investigate the Milk Industry in New York State, 1932-1933.

United States Farm Credit Administration, 1934-1937.

New Jersey Department of Agriculture, 1942-1943.

Province of British Columbia, Canada, 1955.

Independent Dairy Farmers' Association, Ft. Lauderdale, Florida, 1956-1957.

In 1949 I was one of the official delegates representing the U. S. Department of State at the International Dairy Congress at Stockholm, Sweden.

In 1948-49 I was a member of the New York Milkshed Price Committee, and in 1952-1953 a member of the Committee for Study of Milk Cooperatives in Relation to the New York Order.

[14,977] Among my recent publications are the following:

1. A Half Century of Significant Development in the Distribution and Pricing of Market Milk. Published as A. E. 1039, Cornell University Agricultural Experiment Station, 1957.

2. Milk Control Programs of the Northeastern States (joint author with S. K. Christensen).

Part I. Published as Bulletin 908, Cornell University Agricultural Experiment Station, 1955.

Part II. Published as Bulletin 918, Cornell University Agricultural Experiment Station, 1956.

3. Milk Distribution and Pricing in Great Britain (joint author with Stewart Johnson). Published as Bulletin 902, Cornell University Agricultural Experiment Station, 1953.

4. An Economic Study of the Operations of Six Leading Milk Companies in the New York-New Jersey Metropolitan Area, 1941-1948. Published as Bulletin A. E. 686, Cornell University Agricultural Experiment Station, 1954.

5. Costs of Distributing Milk in New Jersey. Published by the New Jersey Department of Agriculture, 1943.

I am appearing at this hearing as a public witness in response to an invitation from Mr. H. C. Fedderson, Acting Director of the Dairy Division, Agricultural Marketing Service, United States Department of Agriculture. I have not been and do not expect to be compensated from any source [14,978] other than the New York State College

of Agriculture for time spent or expenses incurred in connection with this proceeding.

In preparing the statement I am about to give, which is being released today as a publication of the Cornell University Agricultural Experiment Station, I have attempted to summarize the problems under consideration at these hearings and to present a brief analysis of solutions that have been suggested at one time or another. Following this I shall comment briefly on the seven principles that have been suggested for consideration in connection with a proposed single order for the New York milkshed.

Examiner HYDE: Have you any cross-examination as to qualifications?

There is none.

Proceed, Dr. Spencer.

The WITNESS: My prepared statement is entitled Problems Of Milk Pricing in The New York Milkshed And Possible Solutions.

The first subtitle of this is Diversity of Pricing and Pooling Methods.

The same production area that supplies milk to the New York City market which is regulated by complementary federal and State orders is the major source of supply for northern New Jersey and many urban centers of upstate New [14,979] York. More limited but significant quantities of milk are supplied from this production area, known as the New York milkshed, to cities in northern, central and eastern Pennsylvania and in New England.

At the point there is a footnote, which reads as follows:

> The term "New York City market" is used in this report to mean the New York metropolitan milk marketing area as defined by federal Order No. 27 and New York State Order No. 126. It comprises the city of New York and the adjacent counties of Nassau, Suffolk and Westchester, all in New York State. Its population is about 10 million.

The production area for the New York City market,

known as "The New York milkshed," may be reguarded as consisting of those counties in which there are plants regulated by Order 27, together with neighboring counties within the same general territory which comprises most of New York State, northern New Jersey, northern, central and south central Pennsylvania, and limited areas of western New England. About 45,000 producers deliver milk regularly to nearly 400 pool plants under this order.

Continuing now with the text, the various sales areas for milk produced in the New York milkshed represent a [14,980] wide diversity of conditions with respect to methods of determining dealers' buying prices and ways of allocating the proceeds of milk for fluid and nonfluid uses to producers.

The New York City market, Boston, certain secondary markets in Massachusetts, and the Philadelphia market are fully regulated by federal orders or by a combination of federal and State orders. Other markets in New England, upstate Pennsylvania and New Jersey, as well as the Rochester and Niagara Frontier areas in New York State are regulated with varying degrees of effectiveness by State milk control agencies. Upstate markets in New York State, with the exception of Rochester and Niagara Frontier, are wholly unregulated.

Returns from fluid sales and other uses of milk are allocated to producers in different ways depending upon the type of regulation or arrangement by the industry. There is a mixture of flat pricing, dealer blending, cooperative pooling and marketwide equalization.

Producers in the New York milkshed who supply the different sales areas subject to this great diversity of pricing and pooling methods are intermingled. In many parts of this production area, regulated and unregulated plants buy milk in direct competition with one another.

Pricing and Pooling Under Order 27:

[14,981] Federal Order No. 27 and New York State Order

No. 126, which pertain to the New York City market, establish minimum prices to be paid for milk used in fluid sales and for other purposes which is received at plants subject to the regulation.

In practical effect, this means all plants having health department approval as sources of fluid milk or fluid cream for New York City or for municipalities in the counties of Nassau, Suffolk, or Westchester.

Order 27 provides for marketwide equalization whereby a uniform minimum price to be paid all producers, subject to specified differentials, is calculated each month.

* * * * *

[14,985] In nearly all cases the unregulated dealers or plants buy very little more milk than they sell for fluid use. This means that their cost for producer milk used in fluid sales is only slightly higher than the uniform price under Order 27 and substantially less than the Class 1-A price. The same is true of Class 1-C milk which is used by many dealers to supplement the supply of unregulated milk bought from producers.

State and Federal Regulation in Pennsylvania:

The Pennsylvania Milk Control Commission fixes minimum class prices to be paid by dealers for milk purchased within that State. These prices apply to most of the milk purchased for sale in the Pennsylvania cities which lie within or adjacent to the New York milkshed, such as Scranton, Wilkesbarre, Hazelton and Williamsport, and the Pocono resort area. Comparatively little unregulated milk is available to the Pennsylvania dealers.

Under the Pennsylvania system of regulation, each dealer pays a blended price to his producers based on his own uses of the milk purchased from producers. These dealers, [14,986] like those in northern New Jersey and upstate New York, keep their purchases closely adjusted to their fluid sales. Consequently the blended prices paid are gen-

erally higher than the prices paid at Order 27 plants in the same territory.

The Philadelphia market is regulated by a federal order which, like the State milk control orders in Pennsylvania, provides for the payment of blended prices by the various dealers.

The Class 1 prices fixed by the Philadelphia order have been lower than Class 1-A prices under Order 27. Nevertheless the blended prices paid by Philadelphia dealers are generally higher than Order 27 uniform prices at comparable locations. These differences are possible because most Philadelphia dealers restrict their purchases and use a high percentage of their receipts in fluid sales. They rely upon the New York pool for part of the seasonal and long-time reserves.

* * * * *

[14,987] Cooperative pooling: The Dairymen's League Cooperative Association and at least one or two smaller associations pool the proceeds of milk sold in regulated and unregulated sales areas, and participate in one or more of the marketwide pools. This undoubtedly mitigates to some extent the evil of price disparities caused by inequitable regulations. Unfortunately, however, the major part of the unregulated milk is produced by farmers who are not members of such associations. Differences in methods of regulation and in prices throughout the New York milkshed have created serious problems for the cooperatives and tend to weaken their efforts to promote orderly [14,988] marketing.

Obstacles to the Free Movement of Milk:

Substantial differences in returns to various groups of producers in the New York milkshed, depending upon their market affiliation, have existed for many years. This has been possible because of certain impediments to the shifting of milk from lower-priced to higher-priced outlets. Chief among these impediments have been individual han-

dler pooling under certain regulatory programs, and health department regulations.

Handlers who are required to pay minimum class prices and to return to their producers blended prices based upon their own uses of milk are under strong pressure to limit their purchases to little more than the amount of their fluid sales. They generally refrain from handling more than the bare minimum of reserve supplies. Consequently, as in the Pennsylvania markets, the blended returns are higher than normally result under marketwide equalization.

* * * * *

[14,990] The WITNESS: It is. Page 16.

Between 1948 and 1956 pool volume rose 40 percent, sales of fluid milk and cream 12 percent, and the excess over fluid sales 134 percent. The percentage of total receipts at Order 27 plants used in fluid sales fell from 72 percent in 1948 to 55 percent in 1956.

The primary cause of this unfavorable change was a rather striking general increase of milk production throughout the northeast, as well as in other parts of the United States. Total milk production on farms in the North Atlantic States rose from 18.1 billion pounds in 1948 to 22.2 billion pounds in 1956, a gain of 22 percent. The rate of increase in New York State during the same period was 25 percent.

An important secondary cause of the great increase of pool volume under Order 27 has been the influx to the New York pool of many plants and farms that formerly had other outlets for their milk.

A recent tabulation prepared by the Market Administrator's office showed that between August 1948 and August 1956 plants that entered the New York pool received 40 million pounds more milk from producers (in August) than the plants which left the pool. The quantity of milk added to the pool by this net gain in plants and producers amounted to 35 percent of the total gain in pool volume during this 8- [14,991] year period.

I might say that these facts are taken from a tabulation which has been entered in this hearing as Exhibit No. 166, I believe.

• • • • •

Continuing with the text, as matters stand today, most of the long-time reserves and part of the seasonal reserves for all markets of New York State, except Rochester and Niagara Frontier, all of New Jersey, most of Pennsylvania and part of New England, are carried in the New York pool. [14,992] It is not difficult to understand how this came about. With uniform prices under Order 27 much higher than the manufacturing value—Class 3 price—it was logical or even necessary for handlers and plants using much milk for manufacture in or adjacent to the New York milkshed to become regulated by Order 27. It was not particularly difficult for them to qualify for participation in the pool.

The volume of production in the New York milkshed and immediately adjacent territory which remains unqualified for fluid use, i.e., lacking health department approval, has shrunk almost to the point of complete disappearance.

There has been a strong tendency for unregulated handlers to buy short and to supplement their receipts from producers with Class 1-C milk from Order 27 plants when necessary. Producers released by such handlers have usually become patrons of Order 27 plants.

There seems also to be a considerable amount of seasonal shifting, whereby unregulated handlers attract producers from pool plants by paying premiums during the season of low production, and let them go before the flush period arrives.

• • • • •

[14,993] The diversity of pricing and pooling methods heretofore described has three significant effects which of-

fend our sense of justice and are clearly in conflict with the principles of orderly marketing. These evil effects of the present hodgepodge of pricing methods applicable to milk produced in the New York milkshed are:

a. Milk purchased for distribution as fluid milk in the unregulated and partially regulated sales areas is paid for by dealers at substandard rates only slightly higher than the Order 27 uniform prices. This means a serious loss of income to producers in the milkshed as a whole.

b. Dealers buying fluid milk of the same quality from a given source in the New York milkshed are required to pay substantially more if the milk goes to a fully regulated sales outlet than if it goes to a partially regulated or unregulated area. These differences in dealers' buying prices for fluid milk are reflected to a large extent in the prices [14,994] charged consumers in the markets under different types of regulation. Thus consumers in the New York City market are overcharged in comparison with consumers in the partially regulated or unregulated areas, principally in northern New Jersey and upstate New York.

c. There are wholly unjustifiable differences in returns to neighboring producers for milk of the same quality and intrinsic value. Through no fault of their own, producers whose milk goes to plants under Order 27, as well as those who deliver to many unregulated plants, are deprived of a proper share of the high returns from fluid sales in sales areas outside the New York City market, and forced to accept a disproportionate share of the low returns from nonfluid uses of milk produced in the New York milkshed.

* * * * *

[15,008] There is general agreement that the provisions of Order 27 have been administered locally with remarkable efficiency and satisfaction. Based on this experience, there

seems little reason to fear that the administration of a comprehensive order embracing all handlers who receive milk from New York milkshed producers would overtax the capacity of a properly organized administrative staff. Actually such a comprehensive order would not cover a significantly greater scope geographically than Order 27. Many of the dealers and plants in northern New Jersey and upstate New York are regulated by the present order. The risk of inefficient or unsatisfactory administration would be greater with separate orders under different administrators than with a single comprehensive order.

The cost of administering the order or orders for this region is not a major consideration for producers, but experience indicates that this cost would be less with a single, comprehensive order than with two or more separate orders.

Due largely to the great volume of milk involved, the cost per hundredweight of administering Order 27 is less than for any of the other federal orders, less than 2 cents a hundredweight. The greater volume that would be covered [15,009] by a comprehensive order probably could be administered at even lower unit cost unless additional services such as the management of a base rating plan were undertaken.

A single order also would result in less expense to dealers and cooperatives for preparing reports to the Administrator, preparing for and participating in hearings, analyzing orders and operations in relation to orders, and performing other tasks required by the regulation.

* * * * *

[15,010] Basic Reasons for a Single Comprehensive Order:

The principal justification for regulating the prices of all milk produced for the New York City market, northern New Jersey and upstate New York is that the milk supply for all these places comes from a common milk production area. The farms that produce milk for all three segments

of the general sales area are intermingled. Likewise the plants affiliated with the three different sales areas compete directly with one another in buying milk from producers. Orderly marketing can be brought about and maintained only by a closely coordinated uniform system of regulation including milkshed-wide equalization.

There is also justification for a single comprehensive order for all sales areas whose major source of supply is the New York milkshed, in the fact that the three sales areas under consideration have had a close economic relationship over a long period of time.

Prior to the advent of the State milk control program in 1933, practically everyone conceived of the great metropolitan area of New York City and northern New Jersey [15,011] as constituting a single milk market. For many years before 1933 several of the leading milk distributors maintained plants and operated routes on both the New Jersey and the New York sides of the Hudson River. The leading cooperative organization of milk producers—the Dairymen's League—included in its membership producers contributing to the supply of northern New Jersey markets as well as those contributing to the milk supply of New York City and upstate cities. In fact, the Dairymen's League, Inc. was incorporated under the laws of New Jersey.

The economic interdependence of the three major segments of the total market for New York milkshed production, from the standpoint of pricing, has been shown in earlier sections of this report and is generally recognized.

These bonds of unity continue to exist in spite of the dividing effect of different forms of regulation and different price structures established by such dissimilar regulation of the respective sales areas.

* * * * *

[15,020] Item 7—Provisions Relating to Peripheral Milk

These proposals seem reasonable and fair both to the handlers concerned and to the producers whose milk will be priced by the proposed order.

Examiner HYDE: Does that complete your statement, Dr. Spencer?

The WITNESS: It does.

Examiner HYDE: Cross-examination?

CROSS EXAMINATION

By Mr. DANIELS:

Q. Looking at your last observation, Item 7, when you speak of these proposals being reasonable and fair for this peripheral milk, what proposals are you talking about? There are a number in here, or at least two.

A. I believe my comment, Mr. Daniels, relates to all [15,021] of them, all of them.

Q. But they are not the same, the proposals are different. Now, which ones do you think are reasonable and fair?

A. A and B.

Q. Well, I don't have A and B. Tell me what you think is fair for peripheral milk.

Examiner HYDE: Wait a minute. Where are these proposals, so the Colonel can have A and B before him?

Mr. DURBIN: Exhibit 177.

Examiner HYDE: Do we have a copy of it for him?

Mr. WINTON: Mr. Presiding Officer, could we also have this second statement of Dr. Spencer marked as an exhibit for identification, in view of the fact that there will be cross-examination upon it?

Examiner HYDE: Give me six copies of it, please. The document read by Dr. Spencer, captioned "The seven principles for a single order," is marked Exhibit No. 211 for identification only.

(The document above referred to was marked Exhibit No. 211 for identification.)

Examiner HYDE: All right, Colonel Daniels, proceed.

By Mr. DANIELS:

Q. You are speaking of compensatory payments, are you not, for milk coming into the area?

A. It generally relates to that subject, yes.

[15,022] Q. And will you tell me, Doctor, what your notion is as to the reason for compensatory payments, what problem are they supposed to solve?

A. I would say, Mr. Daniels, that the primary problem compensatory payments are supposed to solve is to insure that unregulated milk—unregulated plants which sell milk within a regulated marketing area will be required to pay at least as much as those who are under the regulation, fully under the regulation.

Q. And the main objective there is to protect the producers, which for the moment we may call local producers, or shipping to the local regulated plants' from cut price competition, isn't it?

A. That is certainly part of it.

Q. Well, would there be anything else?

A. I would hope that it is intended to protect handlers from indiscriminate competition, too.

Q. All right, supposed to protect producers and handlers from cut-rate competition, cut-price competition.

A. And to—that's right.

Q. Now, the Pennsylvania Milk Control Commission has been in existence since 1933, has it not, continuously?

A. I believe it has.

Q. And if milk were sold from Pennsylvania into a Federal marketing area, and it could be established—I want [15,023] you to accept that premise—and it could be established that the price that was paid for that milk was equal to or higher than what would be required to have been paid

for the milk under the Federal order involved, then of course we have eliminated that particular proposition of subjecting producers and handlers to cut-price competition, haven't we?

A. Well, of course where you and I are going to have some difficulty getting together on this is that you are talking about a condition in which there are dealer pools, and of course I will not be prepared to concede that you can get an equality of pricing where you have competitive relationship between dealer pools and a marketwide pool.

Q. Well, Doctor——

A. In other words, I assume what you are coming at is that if you have, say, a Class I price under a Pennsylvania order which is equivalent to or even higher than let's say a New York order price, that there is no unfair competition; and I will not be prepared to concede that, because under the set-up of dealer pooling it is inevitable that the handlers who are subject to it will not carry their share of the reserves for the whole area.

Q. Well, now you have added another reason, you are saying that the dealer will not handle his share of the surplus; but I thought maybe we could take one step at a time. So far as the handler goes, whether it is a marketwide pool [15,024] or a dealer pool, handler pool, the dealer pays for his milk on a handler-pool basis, does he not?

A. Yes, I believe that is true, except that the prices, of course, don't get back to the producers in that form.

Q. No, but his costs of sales and the cost of his milk are exactly the same to him as if he were operating under a handler-pool order such as Philadelphia?

A. Well, that is likely not to be quite so, either.

Q. Why not?

A. Because your handler who is operating with a dealer pool or individual handler pool almost inevitably makes a higher return than will come from a marketwide pool.

Q. To his producers?

A. To his producers. Primarily because he is not carry-

ing a proportionate share of the seasonal and long-time returns of the area. And that enables him to attract to his plants a selected group of producers, to pick and choose among the producers of the area, and therefore derive benefits which his competitor, who is within the marketwide pool, does not have.

Q. All right, we will get into that. But for his Class I milk and his Class II milk and his Class III milk he is responsible to the equalization fund on the basis of utilization, applying it to the prices for that milk and those classifications exactly the same as the handler is [15,025] responsible to his producers in the handler pool for the utilization of his milk, and applying that utilization to the prices; now that is correct, isn't it?

A. Well, I think it is, unless you have got a hidden bomb in it that I will find out.

[15,026] Q. Doctor, you need not fear my hidden bomb not nearly as much as I am fearing your hidden bomb.

Now we come back and we will take a plant in Pennsylvania that can establish, if they can't establish it that is another matter, but can establish that for the Class I milk sold, we will say, in New Jersey, instead of paying $5.87 a hundredweight for it, if that should be the price over in New Jersey, or here $6.20 was paid for it, certainly the handlers who paid $6.20 and the producers in Pennsylvania who received $6.20 for that Class I milk did not take any of the New Jersey market or the New York market at a cut price rate, did they?

A. You say he is paying $6.20 and the New York handler is paying——?

Q. $5.87.

A. That sounds pretty good.

Q. And we go a step further and the Class I price, the manufactured price in Pennsylvania, would be a few pennies higher than the Class II price in New York and New Jersey, again, being able to establish that neither the Pennsylvania producer or handler was subjecting the order

producers or handlers to cut price competition, were they?

A. Well, let's assume that.

Q. Now do you know what the price is in Area No. 6 which is Allentown and Easton right now for Class I milk in [15,027] Pennsylvania?

A. No, Mr. Daniels, I don't.

Q. Would you accept my word that it is $6.20?

A. I surely will. You ought to know.

Q. That is 4 percent. That is $5.95.

A. F.O.B. the city?

Q. F.O.B. the plant.

A. Yes.

Q. Now, Doctor, I am going to look that up, but it just came to my mind it is a little higher because we had a price increase. Now as to whether or not the handler could establish it of course is a matter of mechanics which we need not go into.

A. I am not sure but what that is pretty important, though.

Q. You mean you want to go into it?

A. No, I would like not to, but I think there are administrative problems involved in these as well as economic problems involved, and I am not an expert on administrative problems.

Q. You wrote a chapter on it. Doctor, my suggestion is this, which I have made before, and you haven't heard it in all probability and maybe are not the least bit interested, but I am going to make it again.

A. You can count on my interest, I can assure you of [15,028] that, Colonel Daniels.

Q. All right. Doctor, could not the recommendation for this peripheral milk be amended by writing them exactly as you have recommended but then put this proviso in that they should not be applicable where the handler could establish the situation that you and I have just been discussing, namely, that he pay equal to or more for the milk that was sold here than he would have had to pay under

the Federal Order prices, putting the burden on him to establish it, eliminating this administrative effort on the part of the Administrator? Wouldn't that be a valid modification, Doctor, in carrying out your objectives?

A. Let me answer it this way, Mr. Daniels: I certainly would not like to see any unnecessary hardship created for any handler or any producer. My only concern is that there be established by some proper means an equality of opportunity between those in the pool and under the regulation and those who are not. My primary concern with the question you raise is this administrative aspect, I think, and I doubt that the administrative problem from the viewpoint of the administration of the Order could be eliminated by putting the burden of proof on the handler. The Administrator, it seems to me, would still have a great responsibility in this and, as I said before, I don't consider myself an expert on it. I would much prefer to leave this [15,029] to people who have had more experience with this type of thing than I have had. I will agree with you in principle that it is desirable to establish by these orders an equality of opportunity and a fair relationship. If the proposal here does not establish that and if there are improvements that can be made in it I would certainly subscribe to them so long as the principle is carried out.

* * * * *

[15,052] Q. Doctor, can we economically manufacture milk in the east without depending on a high Class I price or a high Class [15,053] I utilization to return the producer a higher blend than he would otherwise get? I am putting it badly, maybe.

A. Well, let's say only to a limited extent. Certainly the opportunities for putting milk directly into manufacture on its own feet, so to speak, are limited in this part of the country.

Q. And that is because cost of production is higher here than in the west, is that the reason?

A. I would say so.

Q. All right. Now that being so, Doctor, what do you think the correct balance between production and Class I demand should be?

A. In the territory as a whole?

Q. Well, let's take first——

A. My New York milkshed, for example?

Q. Yes. And then the one you are advising or recommending. On your New York milkshed, yes, that is right. Go ahead. What do you think it should be?

A. Well, I would approach it this way, Mr. Daniels. I think experience shows that a marketing area of substantial size such as we have in this part of the country needs, well, somewhere between 10 and 20 percent as a minimum of excess over fluid sales in the month of lowest production or the month in which the production and fluid sales come closest together; that would be approximately an ideal situation, [15,054] and then for the other months of the year it will depend upon how much divergence there is between the seasonal patterns of production and consumption.

* * * * *

[15,255] Q. Dr. Vial, what I am getting at is this: Suppose Pennsylvania didn't regulate the price of bulk milk going out [15,256] of Pennsylvania, nevertheless, the price that the farmers demand for that milk will be related to what the farmers are getting for the regulated milk in Pennsylvania—that is, the State regulated milk?

A. Well, I can imagine they might ask for it. Whether they can get it or not is another proposition, I think.

Q. Have you looked into that?

A. No, I have not. I am not acquainted at all with the regulations of the Pennsylvania Milk Control Board.

Q. But you are making a recommendation here that goes directly to—that involves that Pennsylvania milk?

A. Well, as I understood it Pennsylvania did not price bulk milk going out of the State, and you are saying that

they are considering doing it. Maybe they considered doing that for a long time.

Q. That is not my point right now. My point now is that what is paid to Pennsylvania farmers by virtue of the milk they do regulate certainly influences what they will have to pay for milk on which there is no regulation. Don't you think that is so, as an economist?

A. Well, you will have to state that over again. I didn't get all of that.

Q. Well, I will state it this way: If Pennsylvania, through its orders, fixes such prices as return to the farmers in eastern Pennsylvania or any place in Pennsylvania, [15,257] but particularly in eastern Pennsylvania, a high blend price, certainly that high blend price would have an influence on what would have to be paid for milk that goes out of the State, isn't that so?

A. Well, it might have some influence. I have also understood that in times of surplus and when it is difficult to the product, that handlers have been able to go to the Pennsylvania Milk Control Board and get special adjustments under certain situations for a certain length of time. Whether that applies to milk shipped out of the State I do not know, but if they do things like that——

* * * * *

[15,269] Q. Now if you had another plant outside the marketing area but within the same general local milkshed for the two plants, is it your understanding that the producers that deliver to the plant outside the marketing area would get a higher price or a lower price?

A. I think they would probably get a price somewhere near the blend price in that area.

Q. If it got very close to the blend might there not be pressures which would perhaps put the processing plant that is inside the marketing area in a little better competitive position by virtue of pressure of the producers on the unregulated handler to increase their returns?

A. The handler in the market area is paying the Class I price for that. The handler outside the area is paying somewhere near the blend price, and for the last year it must be at least a dollar difference, maybe more than that difference, so that if the handler inside is paying on a classified price and the unregulated handler is paying the other, that makes a big difference.

Q. In other words, you don't think that the pressure would be just a question of the amount of reduction in, shall we say, profit that the unregulated handler would be willing to take to compete?

[15,270] A. The unregulated handler would take?

Q. Yes.

A. I think he has all the gravy in this anyhow.

* * * * *

[15,280] MORRIS S. BLANDING was called as a witness, and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. WINTON:

Q. Will you give your name and address to the reporter, please.

A. Home address or——

Q. Yes.

A. Morris Blanding, 65 Washington Avenue, Hillsdale, New Jersey.

Q. By whom are you employed, Mr. Blanding?

A. Sealtest Sheffield Farms Division of National Dairy Corporation.

Q. In what capacity?

A. I have charge of the country operations which include the operation of the country plants, procurement of [15,281] milk and utilization of milk to the city or manufacturing plants.

Q. How long have you had that specific responsibility?

A. About 6 years.

Q. Will you give us something of your general academic background and training, and also your experience in the milk business beyond that which you have testified to.

Col. DANIELS: As far as our dealers are concerned, we will admit that he is eminently qualified without going into anything.

Mr. WILES: I will, too, but I would like to hear it anyway.

Examiner HYDE: Some reviewing authority might not be so willing. Let's hear it.

The WITNESS: I was born on a dairy farm near Syracuse. I went to college at Cornell University, and majored in agricultural economics.

I worked for the Greater New York-New Jersey Milk Institute in New York City, which was one of the predecessor organizations of the present Milk Dealers Association.

In 1938 I went with Sheffield Farms Company as economist and working with federal order, and continued in that capacity until about 6 years ago, when I took over my present responsibilities.

[15,282] By Mr. WINTON:

Q. Did you state what degree you held and what college you went to?

A. Bachelor of Science.

Q. And you took courses in marketing with Dr. Spencer, did you not?

A. Yes.

Q. The testimony which you are about to give, Mr. Blanding, is on behalf of the Milk Dealers Association of Metropolitan New York, Inc., the Sealtest Sheffield Farms Division of National Dairy Products Corporation, and The Special Committee of Milk Distributors of Northern New Jersey, previously identified on the record, is it not?

A. Yes, it is.

Q. Can you tell me, based on your experience, whether there is any extra value to nearby milk other than the difference in the cost of transportation to the city?

A. No, I would say there is no basic difference in value laid down in New York City, as to where that milk originates.

Q. What is your opinion of the various direct-delivery differentials which the producer groups have urged at this hearing?

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[15,284] Q. Col. Daniels asked some questions of Dr. Vial about State regulation of milk prices in Pennsylvania. Your [15,285] company operates some plants in Pennsylvania, does it not?

A. Yes.

Q. Can you tell me from your experience whether or not the State of Pennsylvania prices milk at a plant located in Pennsylvania which is received there from producers and shipped in bulk outside of the State?

Col. DANIELS: Well, I said it did not. But I would be glad to hear Mr. Blanding say it does not.

Examiner HYDE: Well, if it is to count, and he wants to rely upon it, we have got to have it in here through a witness.

The WITNESS: It does not regulate such milk as you describe.

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PROMULGATION PROCEEDINGS

GLEN A. BOGER

[15,313] Mr. DANIELS: I would like to call Mr. Glen Boger to the stand, please.

Examiner HYDE: Mr. Boger.

GLEN A. BOGER was called as a witness and, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. DANIELS:

Q. Mr. Boger, will you state your full name, please?

A. Glen A. Boger.

Q. Where do you live?

A. Allentown, Pennsylvania.

Q. Will you state your connection with the milk industry?

A. I am president and general manager of Lehigh Valley Cooperative Farmers in Allentown, Pennsylvania.

Q. How long have you occupied that position?

A. 24 years.

Q. Now before we go into the details of that would you state your other connections in the agricultural and milk field?

A. I am a member of the Federal Farm Credit Board, I [15,314] am First Vice President of the National Council of Farmer Co-operatives, and I am a member of the board of directors of the National Milk Producers Federation.

Q. This Federal Credit Board, that is a Presidential appointment?

A. I was appointed by the President to that, yes.

Q. Now, are you active in all these organizations that you just mentioned?

A. Yes, I am.

Q. And you have studied the problems that come before these various organizations?

A. Yes, I have been quite familiar with them.

Q. And the milk problem is one?

A. That is my special problem.

Q. The Lehigh Valley Co-operative, Milk Producers Co-operative, is located in Allentown, Pennsylvania?

A. Yes, sir.

Q. How much milk do you handle a year? Refer me to the page, please?

A. Page 12.

Q. Page 12 of his annual report which he has before him.

Mr. WINTON: Are you going to identify that in the record?

Mr. DANIELS: I just——

[15,315] Mr. WINTON: I mean by six copies.

Mr. DANIELS: No, I am not offering it in evidence.

By Mr. DANIELS:

Q. Annual report to the stockholders of Lehigh Valley Co-operative Farmers, year ending January 31, 1957. He is simply referring to it to get the figures.

A. In that fiscal year we handled 184,465,474 pounds of milk from producers.

Q. Mr. Boger, what did you handle in the short month which was November, I believe?

A. In November, 13,210,995 pounds.

Q. And what did you handle——

Mr. WILES: May we have that figure again?

The WITNESS: 13,210,995 pounds.

By Mr. DANIELS:

Q. That was November of 1956?

A. That is right.

Q. What was the long month that year?

A. The long month was in May and we handled 18,352,734 pounds.

* * * * *

[15,317] Q. What do you do with that milk?

A. We manufacture it. We make milk powder, we make quite a lot of ice-cream.

Q. How much ice cream last year?

A. I don't know whether or not I ought to give away secrets of this kind or not.

Q. Don't answer any questions that you feel are confidential, just the ones you feel like giving.

A. Last year we made 3,764,000 gallons of ice cream.

Q. And do you care to give the figure of manufactured product such as powder?

A. I don't have the figure on powder with me. We made quite a lot of cottage cheese, 4,781,000 pounds of cottage cheese last year. My guess is that we probably made 600,000 pounds of roller processed powder and about 5,000 barrels of sweetened skim condensed.

Q. What was your Class I utilization for the year ending January 31, 1957?

A. The average for the year was 63 percent.

* * * * *

[15,324] Q. Mr. Boger, there was an exhibit yesterday placed in the record, Exhibit 210, which is a table showing that the Order 27 pool in 1956 had 40.2 percent in Class I and I-A, which is their fluid milk up here, I mean, 40.2 in Class I-A and Class I-B, which is their Class I milk sold in the area [15,325] and out of the area carrying the full Class I price, and 7.5 percent in Class I-C which is fluid milk sold in Northern New Jersey and upstate New York at 20 cents above the blend or a total of 47.7 percent in the fluid milk classification and 52.3 percent in lower classifications, 44.8 percent of that being in Class III. Other information of the same figures for other years was put in the record. Conclusions have been drawn that New York is carrying the surplus for Pennsylvania, Northern New Jersey, and particularly Northeast Pennsylvania. I would like to know whether or not you have given any

thought to that problem, namely, why there is so much milk in the New York pool with such a low annual Class I percentage?

A. Well, I have always been of the opinion that the pooling process does invite surplus milk into the market because I think, well, if I were not a co-operative milk plant and was in the pool I would want to manufacture all that I could and to have all the manufacturing milk that I could get hold of because there is money to be made on manufacturing milk. I think there is a tendency under the pool arrangement to increase the amount of manufacturing milk in the pool. I think it is a natural tendency and legitimate tendency of all milk dealers to do so.

Q. If they can get it at the manufacturing price set under Order 27?

[15,326] A. That is right.

Q. Now how can they get the milk at that price under Order 27 in a marketwide pool?

Mr. WINTON: Mr. Presiding Officer, may I inquire of the Colonel whether this evidence is offered in opposition to a marketwide pool under Order 27? What is the purpose of it?

Mr. DANIELS: If your Honor please, I haven't heard anybody make an offer yet, but I am perfectly willing to make an offer and am very happy to do so. And what I am offering to establish here is that this extended area ought not to be under Order 27 and that 27 is not carrying the surplus for Pennsylvania or Northern New Jersey. I do not care in the least whether Order 27 has a marketwide pool or not, so long as I am not under Order 27. I am going to establish that Order 27 has invited manufacturing milk in at the manufacturing prices because they can return to their producers a larger blend because of the Class I price.

Examiner HYDE: You are really not concerned with that if you don't have to come under it, are you?

Mr. DANIELS: The question is here, maybe I will have

to come under it and that is what I am talking about and that they are trying to increase that blend now by getting a higher share of the Class I utilization in these other markets where we have not invited a lot of manufacturing milk [15,327] in and their blend has dropped because they have; that is what I am trying to establish; that is my purpose and offer of proof.

Examiner HYDE: What is the question?

By Mr. DANIELS:

Q. My question is, could these manufacturing plants get this manufactured milk in in the quantities they do except for the fact that Class I boosts the blend?

A. I doubt very much if they could.

Q. Well, you are in the business. Do you think that milk can be bought for just the manufacturing price in the east?

A. Not very much within the New York, close to New York, or close to Philadelphia.

Q. Well, then, Mr. Boger, is it your opinion that this flood is in here because people want milk to manufacture or because these other areas are dumping their surplus in the market?

A. I think it is in here simply because there has been an inducement on the part of prices for dealers to bring it in and to increase the supply of manufacturing milk in the market.

* * * * *

[15,337] Q. Your cooperative is not only engaged in receiving and shipping milk but also it processes milk and sells it and distributes it as packaged milk and also distributes manufactured products which it manufactures?

A. Oh, yes.

Q. So this return represents not only the return from the business of receiving and shipping milk but also from being in the business of pasteurizing and bottling and man-

ufacturing manufactured products and selling them to the public?

A. Yes, it is a blend of the whole operation.

Q. It reflects a milk distributor's and processor's margin as well as just the margin which you get from receiving the milk at a country plant and disposing of it?

A. I didn't get the meaning of that question.

Q. To the extent that the business of distributing milk and manufacturing milk and selling the manufactured products to the public is profitable, your business reflects such a profit as well as the profit of a shipping plant?

Mr. DURBIN: I object. The question has been asked and answered, both.

[15,338] Examiner HYDE: It seems to me it is repetitious, Mr. Winton. He stated that all of it, the figure he gave us, was a blend of his entire operation.

Mr. WINTON: All right. I think that is correct.

By Mr. WINTON:

Q. Are your prices—that is, the prices which you must pay the producers who ship to you,—fixed by the Pennsylvania Milk Control Commission?

A. We are not required to pay Pennsylvania Milk Control Commission prices to our producers.

Q. Then you are exempt from all pricing?

A. Not from resale pricing.

Q. Well, I meant as to the price you pay producers.

A. That is right.

* * * * *

[15,340] Q. Now on the packaged milk which you sell in the counties of North Jersey, I think Warren County was the one you mentioned in particular?

A. Yes.

Q. There is no governmental authority that fixes the price you must pay the producer on that, is there?

A. Yes, the New Jersey Milk Control Commission. We

have a license under New Jersey Milk Control Commission.

Q. But they don't fix the price you must pay the producers?

A. No, not as far as the cooperative is concerned.

Q. Neither does Pennsylvania?

A. No.

* * * * *

[15,341] Q. You testified to the general effect that the I-C forces down the price that you are able to get in the spring months?

A. Yes, milk is offered very cheap in the New Jersey market during the spring months.

Q. How about the other months, the I-C doesn't bother you then?

A. Well, not as much as it does in April, May and June. It bothers us in other months. For instance, we have plenty of milk available now, but these dealers to whom we are selling are not buying all their milk from us, and haven't for two or three months, because they are buying at a dollar a hundred less.

Q. If you don't sell the milk into North Jersey what is the alternative outlet available to you?

A. We manufacture it.

Q. That is the only alternative outlet?

[15,342] A. That is right.

Q. Now in your case when you manufacture it, do you sell it to wholesale outlets or do you make products which you distribute in your own business?

A. We make products which we distribute in our own business.

Q. So the return that you would get from manufacturing would include the return from the business of distributing the manufactured products as well as from the business of manufacturing the products?

A. Certainly.

Q. So in your case the manufacturing return might be more favorable than the manufacturing return of some-

body who simply manufactured products and disposed of them on the wholesale market?

A. Is that a question?

Q. Yes, isn't that true?

A. I wouldn't know.

Q. Well, when you said that in these spring months you would get more out of the milk by manufacturing it——

Mr. DANIELS: Than what?

By Mr. WINTON:

Q. Than the blend price plus 20 cents, which is the I-C price you had in mind, did you not, the return which your particular operation would get from manufacturing the milk?

[15,343] A. Yes, I think we have a general manufacturing operation. But of course a great deal of our manufactured products are wholesaled and not retailed on milk routes.

Q. Are they just sold on the general market or to particular outstanding customers?

A. They are sold on the general market.

Q. You have both types of operation?

A. Yes.

Q. Do you sell milk products, manufactured milk products, through brokers or to wholesale customers? What did you mean when you said you sold it on the general market?

A. Well, we sell it in competition with other brands, other names. Our ice-cream, quite a bit of it is sold wholesale in competition with other brands. Milk powder is sold and sweet skim condensed is sold at competitive prices and has to be.

Q. I understand that, but do you do it through milk brokers?

A. Very little of it through brokers.

Q. Do you sell to supermarkets and things like that?

A. Well, we sell bottled milk to supermarkets. We sell ice-cream to supermarkets. We sell ice-cream to other

milk dealers and sell cottage cheese to other milk dealers, and we sell milk powder to a large number of different companies.

[15,344] Q. You testified against a compensatory payment on shipments of packaged milk from your Allentown plant into the proposed North Jersey marketing area. Also did you testify against compensatory payments on bulk milk as well?

A. Yes.

Q. When you make such shipments you don't equalize the Class I market price which you get with other producers, do you? Your cooperative keeps the full Class I price which it gets for that Class I milk?

A. That is right.

Q. Whereas other producers and dealers have to equalize?

A. Well, of course, there our theory is our basic operation is for the benefit of producers. We don't think producers are benefited generally over the country by dragging down the higher price of one group who maybe is doing a good job, efficient job, to the lower level of another group which is operating under entirely different conditions. For that reason why we don't believe in compensatory payments and we don't think that compensatory payments has done a good job from anything we have been able to observe for the producers in the New York market. I think the evidence is there that they have taken lower prices, producers in the Philadelphia market and the producers in a lot of other markets. We don't want to be dragged down to that level.

Q. Your proposal would permit one group of producers [15,345] to participate in the Class I regulated market without equalization, wouldn't it?

Mr. DANIELS: Just a minute. He is misquoting what Mr. Boger said.

Examiner HYDE: No, he isn't misquoting, he is asking.

Mr. DANIELS: No, he is stating that is what you said.

Examiner HYDE: No, I didn't so understand it. I will have it read if you want.

(The pending question was read by the reporter.)

Mr. WINTON: I didn't ask him what he said.

Examiner HYDE: It is just a question. Mr. Winton admits he is not quoting his testimony, isn't that right?

Mr. WINTON: That is right.

The WITNESS: That is true to some extent, and I have heard that argument advanced by producers' organizations in the midwest, with which I am quite familiar, that they are shut out of eastern markets by marketing agreements, and so on, and they would like the whole thing opened up and be a part of the pool here also, whereby they could ship milk in here and also part of the New York, Pennsylvania, and any part of the United States, in fact. I don't think it can be equalized. I think you destroy efficiency in the operation of milk dealers when you try to equalize the whole thing. I [15,346] believe the producers are dependent to a great extent upon the efficient operation of milk dealers.

By Mr. WINTON:

Q. Your plant is in competition with Order 27 handlers, isn't it, at the producer level?

A. What do you mean, farmers?

Q. Yes.

A. I believe there are some Order 27 handlers taking milk out of the area that we are.

Q. Well, let's look at the competitive situation at the producer level of your plant contrasted, let us say, with a proprietary plant which did the same kind of operation but was a regulated Order 27 handler. Let's assume he had exactly the same Class I percentage as you have, but let's assume it was all sales in North Jersey, to simplify it. He would have to return to his producers the Order 27 blend, wouldn't he?

A. Providing it was a comprehensive order, you mean?

Q. Assuming he were regulated and that the order covered North Jersey.

A. What do you mean by "regulated"? We are regulated.

Q. I meant regulated by a federal order. Let's suppose a single order is adopted and he is covered by it, and the single order covers North Jersey and that you are not subject to compensatory payments because your recommendation [15,347] as to that is adopted. Now let's compare your competitive position with the regulated handler under that single order. Let's assume that you have the same utilization.

A. Of course we are in competition with a large number of dealers who are taking milk from producers under federal order, the Philadelphia federal order, and there is quite a variation in prices that those dealers return to their producers. I don't think there is any competitive advantage or disadvantage amongst them in that respect.

Q. Well, let's look at the situation which would prevail in the case I gave you. The federally regulated handler under this proposed single order would have to pay the blend price regardless of his utilization. Even if he had a higher Class I utilization than you had his producers would only get the blend, isn't that right?

A. I think I made it very clear in my statements before that I don't believe that is a good policy for the producers in any market. I don't think it is fair to the producers of any market.

Q. Well, do you think it is fair to this handler that he should have to pay the excess Class I utilizations into the pool and pay his producers the blend when he is in competition with you, and you would be exempted from any compensatory payment and could return the enriched blend with the full Class I use, including your sales in the North Jersey [15,348] marketing area to your own producers and not have to pool them?

Mr. DANIELS: Now you ask two questions. One is not pooling them and one is not compensatory payments.

Mr. WINTON: He doesn't have to pool them or pay compensatory payments under this proposal.

Mr. DANIELS: Provided he pays the farmer as much as he would under the order.

The WITNESS: Then I don't think there is any disadvantage if I pay the farmer as much as is required under the order.

By Mr. WINTON:

Q. You could return more to your producers than he could?

A. We do anyhow.

Q. Well——

A. We are doing it now.

Q. You do that under special circumstances which exist today amongst which is one that you are one of the largest——

A. I think that brings up the question as to the purpose of compensatory payments. I always understood that the purpose of compensatory payments was to prevent any dealer from buying cheap milk and putting it on the market in competition with other milk. Now if the purpose of compensatory payments is to protect the handler against competition, that [15,349] is another thing to be considered.

Q. One of the things is not to disadvantage him because of federal regulation, not to make one handler pool and another competing with him not to pool.

A. Well, Order 27 at the present time I believe is buying some from producers in that area in competition with us. They know whether they are at a disadvantage there or not from a buying standpoint. I think probably they are, but it is the price that the pool is returning to those producers is so ridiculously low that I don't think it is our fault or anybody else's fault, so far as the dealers are concerned.

Mr. DANIELS: As far as the dealers are concerned, he said.

By Mr. WINTON:

Q. Do you happen to know whether there are any plants in Pennsylvania which buy milk predominantly for shipment outside the State in bulk?

A. Oh, I think there are quite a number in the northern part of the State that do.

Q. Do you know whether any of them are unregulated?

Mr. DANIELS: You mean not regulated?

By Mr. WINTON:

Q. Not federally regulated?

A. No, I don't know whether they are or not.

Q. Well, do you know what the prevailing level of [15,350] producer prices is at plants which are shipping milk outside the State from Pennsylvania?

A. No, I don't.

Q. You testified that one of the reasons that Order 27 had so much milk was that it invited this manufacturing milk. Do you recall that?

A. Yes.

Q. Now that manufacturing milk, so-called, isn't that all of the same quality which is suitable for use as fluid milk?

A. Well, I wouldn't know. I wouldn't know.

Q. Do you know that one of the requirements proposed for the single order, and which already exists in Order 27, is that it be approved for use as fluid milk by one of the health authorities in the marketing area?

A. I wouldn't know that except that I do know that some of these New Jersey producers who have applied to ship milk to our plant could not pass our inspection. We haven't been able to take them as yet.

Q. Well, your inspection is very stringent, is it not?

A. I would say that it is.

Q. Is one of the purposes of your inspection not to make it too easy to get into your co-op?

A. No.

Q. Is it much higher than the inspection of New York [15,351] City.

A. I think it is.

Q. What would happen to this manufacturing milk in Order 27 if it were excluded as you seem to be recommending? What would those producers who make it do?

A. I don't know.

Q. Well, do you think they could find a place where they could sell it at the level of the Order 27 blend?

A. I don't know.

Mr. DANIELS: Just a minute. Do you mean a blend now with all the milk in or what the blend would be if some were excluded?

Mr. WINTON: I will take it either way.

Mr. DANIELS: Take it one at a time.

By Mr. WINTON:

Q. Do you think they could find a place to sell it at a price equal to the blend which would prevail if they were excluded from Order 27?

A. I think it would be very difficult on them to exclude it all at one time. I think the tendency over the years is for the dealers to bring in more manufactured milk into the pool. Naturally they can make money on manufactured milk.

Q. That wasn't my question. My question was what would the producers of this milk do with their milk if they [15,352] were excluded from Order 27?

A. I don't know.

Mr. DANIELS: Just a minute, Mr. Boger.

Mr. DURBIN: There is no use talking about it. The witness said he don't know.

Mr. DANIELS: May I address the Chairman?

Mr. DURBIN: Go ahead.

Mr. DANIELS: You cut in on me.

Examiner HYDE: That is all right. What do you want to say?

Mr. DANIELS: I say that the question has just been answered, and Mr. Boger also said that to do it all at one time he wouldn't advise. Now then that answers the question. He isn't saying that they do it all at one time. He is saying the process ought to be eased off and not enlarged.

Mr. WINTON: I will withdraw the question and ask a somewhat different question.

By Mr. WINTON:

Q. Based on your experience would the price for milk for manufacturing be as high as the blends prevailing under fluid marketing orders or under an order such as Order 27?

A. Oh, I don't think so.

Q. Well, then, wouldn't your recommendation come down to this: Either the excluded producers would have to stop producing milk or they would have to sell it at a very much [15,353] lower return?

Mr. DANIELS: Now, I don't think you said what you wanted to say. The producers aren't manufacturing the milk. Your question was the producers——

Mr. WINTON: Could I have the question read?

Examiner HYDE: The reporter will read the question.

(The pending question was read by the reporter.)

The WITNESS: I think if it were not for the pooling arrangement that the dealers themselves would solve that situation the same as they have in the Philadelphia market. I think that the producers have done much better in the Philadelphia market without any pooling arrangement or without any compensatory payments. I think the farmers are much better pleased there that ship to the Philadelphia

market and undoubtedly there is a lot of milk in Pennsylvania that is being manufactured at the present time, with the farmers getting rather a low price. I refer to the Hershey Chocolate Company, which takes in approximately one million pounds of milk a day from producers. They take a very low price for that milk. Of course if there was a market pool in Philadelphia undoubtedly eventually that milk would get into the market pool, a lot of it, and reduce the price generally on fluid milk producers in the Philadelphia market.

By Mr. WINTON:

Q. Isn't the answer to my question yes, that you don't [15,354] think it is such a bad situation?

A. It has been so long ago I kind of forget the question.

Q. The question was, don't your recommendations come down to this, that the producers excluded from Order 27 will either have to stop producing the milk or they will have to sell it at a lower return?

Mr. DANIELS: I object to that. He asked that question in just those words and Mr. Boger gave him an answer.

Examiner HYDE: Then Mr. Boger indicated to him just now that it has been so long he has forgotten what the question was and it was reread or restated at Mr. Boger's request. He asked Mr. Winton to repeat it. So I am going to let Mr. Winton repeat it. It wasn't objected to before.

The WITNESS: I will give you the same answer that I did before.

Mr. WINTON: That is all.

Examiner HYDE: Any other cross-examination of this witness?

Mr. WILES: I have a couple of questions.

Examiner HYDE: Mr. Wiles.

By Mr. WILES:

Q. I don't think, Mr. Boger, that Mr. Daniels asked you how many producers you have in your cooperative?

Examiner HYDE: Yes, he asked him that.

[15,355] By Mr. WILES:

Q. 3,400, was it?

A. We have 3,400 members.

Mr. DURBIN: 950 who are shipping in milk.

By Mr. WILES:

Q. Is your cooperative set-up broken down into local units?

A. Yes, we have ten local units for membership purposes.

Q. Does your Lehigh Valley cooperative engage in marketwide services as are contemplated by Order 27, if you are familiar with it?

A. I am not familiar with that.

Q. You are not familiar really with the purposes of cooperative payments, either, are you?

A. Yes, I think I am familiar with that to some extent.

Q. Well, would you explain to me, Mr. Boger, then, a little bit in clarification of the perhaps gratuitous remark of the Colonel how doing these things which you do throughout the year in the marketing of your milk would be related to cooperative payments? You say you did them without cooperative payments, and I wonder if that is so very remarkable.

A. Well, I think you can wonder about it.

Mr. POLIKOFF: Can I object to that question?

Examiner HYDE: What is the basis of your objection?

[15,356] Mr. POLIKOFF: I object because all through the Grant case the cooperative which Mr. Wiles represents thought that it wasn't at all remarkable that all through the United States cooperatives render service without

drawing cooperative payments out of the pool, so I don't know why he should be asking Mr. Boger the same thing.

Examiner HYDE: I think the witness answered it anyway. Overruled. I think Mr. Boger gave you such answer as he intended you to have on this, Mr. Wiles.

Mr. WILES: I think he did.

Examiner HYDE: Next question?

By Mr. WILES:

Q. I just wonder, and I ask you, Mr. Boger, if you feel that there is a relationship between cooperative payments and the operation of an operating cooperative like you run?

A. I wouldn't want to add to that question. I happen to be the First Vice President of the National Council of Farmer Cooperatives which is composed of over 5,000 farmer cooperatives, and that is a question I believe in which there is a lot of disagreement amongst cooperatives. I wouldn't want to answer that question.

Mr. WILES: That is all right.

Examiner HYDE: Anything else?

Mr. WILES: No.

Examiner HYDE: Mr. Pollio?

[15,357] By Mr. POLLIO:

Q. Mr. Boger, what is the Class II price in your area?

A. At the present time I believe for February it was $3.56 a hundred, something like that, or approximately that.

Q. What is the average, would you say, for the year?

A. Probably $3.40 or $3.25 or $3.40, somewhere in there.

Mr. WARE: May I ask one question right there?

Mr. POLLIO: Yes.

Mr. WARE: That price that you referred to in both instances was 4 percent milk?

The WITNESS: That is right.

Mr. WARE: Thank you.

By Mr. POLLIO:

Q. You made a statement that during a certain time of the year you could not afford to sell milk at a price which is a blended price under Order 27, is that correct?

A. Yes.

Mr. DANIELS: Plus 20 cents.

Mr. POLLIO: Plus 20.

By Mr. POLLIO:

Q. Can you realize that much money from manufacturing, Mr. Boger, from this surplus milk by manufacturing, rather than by selling it at the blended price?

A. I would say pretty close to it. Pretty close to it. [15,358] Q. In any event, it would be less?

Mr. DANIELS: In any event it would be less than what?

Mr. POLLIO: Less than he could recover from manufacturing as he could from selling it at the blended New York price.

The WITNESS: Our policy is in that respect that we just don't want to knock down our price schedule just because there is a surplus of milk. We don't believe it is good for us or for the industry to do it. Our price to our producers does suffer, of course, a blend price, when we have to manufacture a lot of milk, but even at that our blend price return to them is pretty good. In other words, last May it was $4.85 blend price during all the manufacturing that we did. So that it does hurt naturally our total blend price, but I think we would be hurt much more if we reduced our selling prices just because there is a surplus of milk on the market and we have set up the manufacturing facilities for that. Maybe six months out of the year our manufacturing facilities don't operate at all—that is, our surplus manufacturing facilities.

By Mr. POLLIO:

Q. The reason for asking the question was because you said that it didn't pay you, rather than the explanation you just gave, which is somewhat different.

[15,359] Examiner HYDE: Next question?

By Mr. POLLIO:

Q. What is the surplus in your operation, 20 percent, did I hear you say?

A. Well, last year 63 percent for the year, 63 percent of all our milk was utilized as Class I. Taking the month of May that may get down to 45 percent, 45 to 50 percent, of it utilized in Class I.

Q. How do you justify your statement that when you sell milk in Northern New Jersey you multiply 20 percent of the manufacturing price and 80 percent of the Class I price, is that correct?

A. Multiply 20 percent of the Class II price and 80 percent of the Class I price and then add 25 cents a hundred to it.

Q. Is it just a formula or is it the actual reflection of the surplus?

A. That is our own formula. On the first of July—that is the formula at the present time. The first of July that goes to 90 percent and 10 percent.

Q. I heard you say that you invite other producers to come to your market, don't you?

A. No, you didn't hear me say that. We don't invite anybody to come. They invite themselves. If they want to ship milk they apply to ship milk. We don't solicit any [15,360] producers to ship milk to our plant.

Q. But you don't refuse to take them in if they want to come in?

A. That is right.

Q. If that were so, wouldn't that reduce considerably the blended price?

Mr. DANIELS: If what were so?

By Mr. Pollio:

Q. If you had more milk?

A. If we had more milk to manufacture, of course if we got down to the point where 75 percent of our milk was manufactured, of course it would reduce the blend price.

Q. Any percentage would reduce it, would it not?

A. Yes, any increase in percentage of manufacturing milk.

Mr. Pollio: Thank you.

Examiner Hyde: Mr. Deming?

By Mr. Deming:

Q. Mr. Boger, do I understand that the sentiments that you have expressed here today reflect those of the 950 shipping members of your cooperative?

A. I believe it does.

Q. Could you tell me how many members of the Lehigh Valley Co-op are also members of the Tri-State National Dairy Farmers Guild?

[15,361] A. I don't know exactly. There are a few.

Q. Would you be able to give us a little closer estimate than a few?

A. There might be 25.

Q. I see. On March 18 Mr. De Otte testified as a member of that organization, the Guild, and said that as far as the Guild was concerned, and I assume those members of your cooperative are also members of the Guild, supported rather emphatically a single order program?

Mr. Daniels: Now, Mr. De Otte was here and he did testify in favor of the single order. He did not say that the 25 members of the Guild that were also members of the Lehigh Valley supported this, and he did not say anyone did it emphatically. He testified as chairman of the Executive Committee for the Guild and I asked him whether

he was expressing the opinion of the Lehigh Valley Co-op, and he said no.

Examiner HYDE: That is exactly as I remember it. Next?

By Mr. DEMING:

Q. I understood the other day that the Co-op as a unit was not being represented by Mr. De Otte. I think that was made perfectly clear.

Examiner HYDE: That is the point Colonel Daniels was making clear here. He was merely mentioning the fact that [15,362] he happened to be a member of that Co-op and that is as far as it went.

Mr. DANIELS: That is right.

Mr. DEMING: That is all.

Examiner HYDE: Anything else? Mr. Parodneck.

By Mr. PARODNECK:

Q. Mr. Boger, you told us that for your last fiscal year you paid to members $745,000 above the Control Board price. Would you mind telling me whether that is above the Class prices fixed by the Control Board?

A. Yes, it was.

Q. And does your report show how much that was per hundredweight for all the milk delivered by members?

A. No, my report doesn't show that. You divide the pounds of milk I gave you, approximately 184 million pounds, into that $745,000, and you would get it. It is about 40 cents a hundred, I guess, a little better than 40 cents a hundred.

Mr. PARODNECK: Thank you.

Examiner HYDE: Over here, Mr. Ware?

By Mr. WARE:

Q. Mr. Boger, I wonder if you could tell us a little bit about the portion of the Northern New Jersey where your

milk is distributed? As I understand it you have some milk that goes into Northern New Jersey on routes. Are those your [15,363] own routes or is that to sub-dealers?

A. In Warren County we have several routes operating into Warren County that are our own routes. We do not have any sub-dealers.

Q. And such distribution is confined within Warren County?

A. Yes, it is. Possibly some other but not of any consequence.

Q. Primarily in Warren County?

A. Primarily, yes.

Q. In Phillipsburg and vicinity?

A. Yes.

Q. What about your bulk sales, do they go into a different area, I mean, your sales to dealers in bulk?

A. Yes.

Q. What part of the area is that? I don't want to know specifically who the dealers are, but in what part of the geography?

A. Well, we sell some to New Brunswick, Linden, N.J.; that is about it.

Q. By those locations you mean that is the location or those are the locations of the plants of the dealers who buy the milk?

A. Yes.

Q. And you are not prepared, I don't suppose, to give [15,364] us any information on what their area of distribution is?

A. No, I am not. I can't say as to that.

Q. I believe you mentioned earlier an amount of money, some $745,000, which you returned to producers last year in excess of what would have been required had you been subject to the minimum price regulation of the Pennsylvania Milk Control Commission. Is that what you said in that connection?

A. That is right.

PROMULGATION PROCEEDINGS

I. ELKINS NATHANS

Q. I was wondering if you knew in calculating the obligation to the Commission, if you had one, and as a means of arriving at that $745,000 figure, at which price the sales in Northern New Jersey were calculated? Were they calculated at the Class I price?

A. They were all calculated on the same basis of the 80 percent Class I and 20 percent Class II prices.

* * * * *

[15,367] Q. Did you give me a figure on an average price for Class II in your area?

A. I told you I thought it was around $3.25 to $3.40.

Q. $3.25 to $3.40. When you consider the butter fat, 5-point butter fat on 7 or 8 cents basis you would have to deduct about 40 cents from that price, would you not?

Mr. DANIELS: Well, go ahead.

The WITNESS: The Control Commission has a 6-cent differential in that area.

Mr. DANIELS: In that particular area on Class I.

* * * * *

[15,486] I. ELKIN NATHANS, resumed the stand as a witness, and, having been previously duly sworn, was examined and testified further as follows:

The WITNESS: I appear today in all of the testimony offered in behalf of Mifflin Creamery Company, Inc., et al. which includes all of the handlers for whom I entered an appearance. My testimony is directed to the United States Department of Agriculture, the Department of Agriculture and [15,487] Markets of the State of New York, and the Department of Agriculture of the State of New Jersey.

Inadvertently, on some of this testimony I left off the State of New Jersey without any intentional slight.

* * * * *

[15,538] If this were merely a hearing to amend Order 27 we would not waste much time on the item of competitive [15,539] pricing. The application of the Class I-A price to Class I-B sales just about wiped out the ability of Order 27 handlers to dispose of their milk outside the marketing area other than as Class I-C in New York State and northern New Jersey. These sales have practically disappeared and what small volume remains is largely into other federally regulated markets.

The markets thus lost have been taken over by unregulated operators.

Neither the State of New Jersey or the Commonwealth of Pennsylvania undertake to price such milk moving in bulk outside their jurisdiction, and have found an attempt to do so merely left a great many of their producers with a large volume of homeless milk.

* * * * * *

[15,589] Q. Mr. Nathans, with reference to the B series of orders of the Pennsylvania Milk Control Commission, you don't have a copy of them with you, do you?

A. I only testified as to B-1. I do not have a copy with me, no.

[15,590] Q. Do you have a copy of B-1 in the office which you consulted before you came here?

A. I have a copy in the office but I didn't consult it.

Q. You don't know, do you, Mr. Nathans, the procedure that is required by the Milk Control Commission of Pennsylvania of a Pennsylvania dealer with regard to selling distress milk?

A. Yes, I do.

Q. What is the procedure required?

A. My information on that is based not only upon the reading of the order but upon a hearing which was held in Harrisburg several years ago at which Mr. Johnnie Pfautz testified.

Q. How many years ago was that?

A. I think it is around three or four years ago.

Q. I am asking you whether you know now what procedure is required of a dealer by the Pennsylvania Milk Control Commission before they may get any kind of a temporary distress milk permit?

A. The order provides that the dealer or handler, rather, shall apply to the Commission for a price to be applicable to what is therein called distress milk.

Q. You know that it doesn't apply to milk that is sold out of the State?

A. It could.

Q. How can it? There is no price fixed for milk sold [15,591] out of the State in bulk.

A. The Commission has the power to fix the price of milk shipped out of the State if they wish.

Q. But they haven't for bulk milk?

A. They have the power.

Q. I say, they haven't fixed it, and therefore this provision doesn't apply to that because there is no bulk milk out of state price fixed.

A. The price that they named to that handler could apply to out-of-state milk, yes, sir.

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SECRETARY'S AMENDATORY DECISION IN 1957

## [4194] Milk in New York Metropolitan Marketing Area and in Northern New Jersey

DECISION WITH RESPECT TO PROPOSED AMENDMENTS TO TENTATIVE MARKETING AGREEMENT AND TO ORDER

Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601 et seq.), and the applicable rules of practice and procedure, as amended, governing the formulation of marketing agreements and marketing orders (7 CFR 900), a public hearing was held at various locations in States of New York and New Jersey during the period June 18, 1956-March 29, 1957, pursuant to the notice of hearing issued on May 18, 1956 (21 F. R. 3527), and supplemental notices issued on May 29, 1956 (21 F. R. 3799), August 29, 1956 (21 F. R. 6680), and on February 26, 1957 (22 F. R. 1219).

Upon the basis of the evidence introduced at the hearing and the record thereof, the Deputy Administrator, Agricultural Marketing Service, on May 9, 1957 (22 F. R. 3318) filed with the Hearing Clerk, United States Department of Agriculture, his recommended decision containing notice of the opportunity to file written exceptions thereto.

The material issues presented are concerned with:

I. Whether the handling of milk in additional territory in the States of New York and New Jersey (outside that currently regulated under Order No. 27) should be subject to Federal regulation, and if so:

1. What the boundaries of such additional territory should be,

2. Whether such additional regulation should be by means of (a) a separate new milk marketing order for Northern New Jersey as a separate marketing area and expansion of the present marketing area under Order No. 27 to include additional territory in Upstate New York, or (b) a single milk marketing order applicable to a single marketing area including the present Order No. 27 marketing area together with additional territory [4195] in Northern New Jersey and Upstate New York, and if by

means of such a single order, (c) whether it should be accomplished by issuance of a new milk marketing order or by amending Order No. 27, and

II. What the terms and provisions of such new or revised regulation (either by means of separate orders or under a single order) should be with respect to (1) the scope of regulation, (2) the classification of milk, (3) class prices and differentials, (4) distribution of proceeds to producers, and (5) administrative provisions; the issues with respect to such terms and provisions being more specifically defined hereinafter.

## Findings and Conclusions

The findings and conclusions hereinafter set forth relative to the above listed issues are based upon the evidence presented at the hearing and in the record thereof.

*Issue No. I* (*need for, and form of, additional regulation*). It is concluded that:

1. The handling of milk in Northern New Jersey and Upstate New York should be brought under Federal regulation.

2. Such regulation should be by means of a single milk marketing order applicable to a single marketing area including the present Order No. 27 marketing area together with Northern New Jersey and Upstate New York, and

3. Such single milk marketing order should be Order No. 27 appropriately amended to apply to the expanded area.

The term "Northern New Jersey" means the territory within the boundaries of the New Jersey counties of Bergen, Essex, Hudson, Hunterdon, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union, Warren, and the northern half of Ocean County (the boundary in Ocean County being specifically set forth hereinafter in findings on specific boundaries).

The term "Upstate New York" means, in general terms (with exact boundaries set forth hereinafter in findings on specific boundaries), substantially all of the territory in Upstate New York that was proposed for consideration at

the hearing, and consists of all or a part of 35 counties and includes the larger urban centers of Syracuse, Utica-Rome, the Capital District and Binghamton, and also such cities as Auburn, Catskill, Corning, Cortland, Elmira, Hudson, Ithaca, Kingston, Middletown, Newburgh, Oneonta, Oswego, Poughkeepsie, and Whitehall. Included also are such important resort areas as the Catskill and Lake George regions.

Defined in general terms another way, the territory consists of the following districts: (1) *The Nearby District* consisting of the counties of Rockland, Orange, Sullivan, Ulster and Greene on the western side of the Hudson River, and Putnam, Dutchess and Columbia on the eastern side of the Hudson River; (2) *The Capital District* consisting of the counties of Albany, Rensselaer, Saratoga, Schenectady, Warren, Washington and Essex; (3) *The Mohawk Valley District* consisting of the counties of Fulton, Montgomery, Herkimer and Oneida; (4) *The Syracuse District* consisting of the counties of Madison, Onondaga, Oswego, Cayuga, and Cortland; (5) *The Binghamton District* consisting of the county of Broome; (6) *The Elmira District* consisting of the counties of Tioga, Tompkins, Chemung, Schuyler, Yates, and that part of Steuben containing the townships of Corning, Erwin, and Addison; and (7) *The South Central District* consisting of the counties of Delaware, Schoharie, Otsego, and Chenango. The territory proposed and listed in the notices of hearing also included Hamilton County and three towns in Lewis County. This latter territory and certain fringe portions of some of the other above listed counties are excluded under later findings relating to the drawing of a specific boundary line.

The milk supply for the present marketing area is delivered by farmers to plants, mainly country plants, located primarily in the States of New York, New Jersey, and Pennsylvania, with a few in western Vermont. There were 385 such plants in December 1956. In New York, the plants are located throughout the State, except for the non-agricultural area in the Adirondack Mountains and in the western parts of the State surrounding Rochester and

Buffalo. In Pennsylvania, the plants are located principally in five northeastern counties and in a group of south central counties. In New Jersey, the plants are located in the rural counties in the western part of the State and immediately surrounding the urban area in northeastern New Jersey. The territory in which these country plants currently supplying the defined New York metropolitan milk marketing area are located is frequently referred to as the "New York milkshed", and that term as used herein shall refer to that territory.

The New York milkshed not only supplies the requirements of the present marketing area, but also virtually the entire supply of milk for Northern New Jersey and numerous other urban areas throughout the milkshed. Northern New Jersey is the largest and most important of these urban areas. Ranking next in size and importance are those urban areas in that part of the State of New York presently being considered for inclusion in the marketing area.

The New York milkshed also supplies some milk for markets in New England and for Philadelphia, and occasionally for markets further south, but is not the principal source of milk for these markets. In addition, the milk sold to such markets on a regular basis comes mostly from the fringes of the milkshed, where at times, there is keen competition among plants for milk supplies.

The principal program for milk price regulation in the New York milkshed has been embodied in the orders regulating the handling of milk for the New York metropolitan milk marketing area (Federal Order No. 27 and New York State Revised Official Order No. 126). On occasion, plants in the milkshed have met the requirements for regulation by a Federal order in New England or in Philadelphia but such instances have been few in number and represent only a minute fraction of the total milk produced in the milkshed.

Production and marketing conditions which have developed in the milkshed while Order No. 27 has been in effect have been influenced to some degree, of course, by that regulation. Order No. 27 has been the only regula-

tion applicable in the milkshed with provision for marketwide equalization, and the regulation under which minimum producer prices (both for Class I milk and uniform prices) have been established substantially above the value of milk for manufacturing purposes.

Under provisions for marketwide pooling, as in Order No. 27, payments to producers are made in accordance with the classification of all milk delivered by all producers under the order. Thus, the individual producer has only limited interest in the utilization of the particular handler by whom his milk is purchased. The individual handler does not find it necessary to limit his receipts from producers to correspond closely with his disposition of milk for fluid use since the handling of milk for other than fluid use results in no greater impact on the price paid to his producers than to producers generally. Provision for marketwide pooling, however, permits specialization of operations by plants with the reserve supply being handled by a relatively few handlers and with manufacturing facilities in a relatively few plants. On the other hand, individual-handler pooling tends to cause handlers to limit their receipts of milk from producers more closely in line with their requirements for fluid distribution in order to pay their producers prices which are favorable in relation to the price paid by other handlers.

Provisions of the order for determining the plants at which milk is subject to full regulation under the order (pool plants) have not resulted in the exclusion from regulation of milk in excess of fluid requirements for the marketing area. Any plant from which a specified minimum percentage of the milk received from farmers is shipped to the marketing are for fluid use may become subject to regulation under the order. In addition, any other plant in the milkshed may be designated as a pool plant if the plant and its producers meet the requirements of health authorities as a source of milk for the marketing area and the milk actually is made available for fluid uses in the marketing area. Thus, the provisions for marketwide pooling under Order No. 27 have been designed to insure supplies

of milk from fully regulated sources adequate to meet the fluid requirements of the marketing area but have not constituted a means of restricting admission to the pool of milk in excess of fluid requirements of the marketing area.

When Order No. 27 was issued in 1938 the price for Class I-A milk was related directly to the value of milk for manufacturing purposes. Under these provisions the Class I-A prices during the period 1941 through 1948 did not advance percentage-wise as fast as the value of milk for manufacturing uses. During this period, however, the demand for [4196] milk for fluid use was high relative to available supplies and during the low production seasons of some of these years considerable difficulty was experienced in obtaining milk supplies adequate to meet fluid requirements for the New York market and more particularly for other markets in the Northeast. This situation and other considerations led to the development of a formula for pricing Class I-A milk for the New York market (and to similar formulas for other northeastern markets) under which the price for Class I-A milk was no longer related directly to milk for manufacturing purposes. During the post-war decline in dairy product prices generally, beginning in 1949 Class I-A prices under provisions of the order then in effect declined slower than prices for milk for manufacturing purposes with a resulting increase in the difference between the price of milk for manufacturing purposes and Class I-A prices.

The need for regulation in additional teritory as proposed depends in considerable measure on the milk production and marketing conditions which have developed under the regulation which has been in effect. Some of such conditions are as follows:

(1) The Order No. 27 minimum uniform price has become the minimum competitive price for all milk eligible for fluid use produced in the milkshed. Unregulated plants must pay at least this minimum price to their producers or the producers will shift their deliveries to a regulated plant. Unregulated plants with a fluid outlet for only a relatively small proportion of their supply have the choice of increas-

ing their fluid sales outside the marketing area or of getting into the pool (if necessary by fluid sales in the marketing area) as a means of continuing to pay a competitive producer price.

(2) Because the Order No. 27 uniform price (resulting from a relatively high Class I-A price) is substantially above the value of milk for manufacturing purposes, dealers serving unregulated markets (within the milkshed or elsewhere) tend to avoid buying unregulated milk for which they have no fluid milk outlet. This is accomplished by one or more of the following means:

(a) When more milk is needed for fluid sales they pay premiums to attract producers from pool plants. When less milk is needed for fluid sales they drop producers who then return to pool plants;

(b) When they become short of milk they may buy part of the production of pool producers for a temporary period;

(c) They buy directly from producers only that milk which they can use for fluid purposes in the months of high milk production and supplement these receipts by buying Class I-C milk from pool plants during other months of the year;

(d) They pay premiums to attract from among a large number of nearby producers those whose seasonal variation in production most nearly coincides with their seasonal requirements for fluid use; and

(e) If the operation is that of a multiple plant operator, those plants equipped to manufacture reserve supplies associated with fluid sales are operated as pool plants, leaving unregulated those plants which are used primarily for fluid sales outside the marketing area.

(3) Milk produced under conditions which permit its use only for manufacturing purposes has practically disappeared from the milkshed. The uniform price has been enough higher than the value of milk for manufacturing so that substantially all dairy farmers in the milkshed already have made the necessary investments to improve their production facilities and have taken other steps necessary to

meet requirements of various health authorities for the production of milk for fluid use.

(4) There has been a general and continuing increase during the past few years both in total milk production and in deliveries of milk by producers to dealers' plants. From 1948 to 1955 total milk production in the States of New York, New Jersey, and Pennsylvania increased 22 percent and deliveries to dealers increased 30 percent. During the same period, the number of producers delivering to pool plants increased from 45,047 to 49,331, an increase of 9.5 percent; average deliveries per day per dairy increased from 338 pounds to 451 pounds, an increase of 33.4 percent, with the result that the total volume of pool milk increased from 5.7 billion pounds in 1948 to 8.1 billion pounds in 1955, an increase of 42 percent. For the year 1955, the percentage of pool milk utilized in Class I (A, B, and C) was 46.9 compared to 61.4 in 1948. Since the increase in the number of producers delivering to pool plants occurred during a period coincident with a general trend toward fewer and larger farms in the milkshed, it is apparent that a substantial part of the increased volume of pool milk was due to a shift into the pool by 1955 of plants and producers not in the pool in 1948.

(5) Producers and producer organizations have developed an interest in, and have submitted proposals for, the extension of milk price regulation to apply to a greater proportion of the milk in the milkshed. Extension of regulation has been proposed in various forms. Organizations representing a large majority of the producers whose milk is now regulated under Order No. 27 have proposed expansion of that order to bring under regulation that portion of the production in the milkshed which is currently unregulated and which is utilized primarily for fluid purposes outside the present marketing area.

Other producer groups representing producers of milk for urban areas throughout the milkshed for which the supply of milk is now unregulated or only partially regulated have proposed that separate regulation be adopted as a means of obtaining a price at least as high as the Class

I-A price under Order No. 27 for a higher percentage of their milk than is possible for producers generally throughout the milkshed. Such latter proposals contemplate some means of preventing the flow of milk from the lower priced market to the higher priced market and the general equalization of returns to producers throughout the milkshed.

Proposals also have been made for "tightening" the pool plant provisions under Order No. 27 for the purpose of excluding from regulation a portion of the milk now regulated under the order in excess of that used for fluid purposes, thus bringing about a higher minimum uniform price to producers under the order. Such proposals appear to contemplate excluding the milk of certain producers (so far without identification of those to be so excluded) from regulation under the order, and appear to contemplate a situation under which a portion of the producers whose milk is now in the pool would no longer share in returns from the sale of fluid milk in any market.

*Analysis—Northern New Jersey.* The population of the 13 Northern New Jersey counties for which regulation is proposed is about 4.1 million, which is about 78 percent of the total for the State and is equivalent to about 40 percent of the population of the present Order No. 27 marketing area. Over 95 percent of the population is in the nine counties in the northeastern portion of the area. Ocean County and the three western counties of Sussex, Warren, and Hunterdon are more sparsely populated, the latter three counties constituting the area in Northern New Jersey in which most of the milk is produced.

There were 839 milion pounds of milk received from producers at plants in Northern New Jersey in 1955. There were 2,855 producers in Northern New Jersey in 1955 with 1,313 delivering to Order No. 27 pool plants and 1,542 delivering to other plants. About 373 million pounds of milk was received from producers at 16 Order No. 27 pool plants in 1955. These plants were all located in the western portion of the area, four in Sussex County, seven in Warren County, four in Hunterdon County, and one in Somerset. A substantially larger proportion of the production in North-

ern New Jersey was received at pool plants in 1955 than in 1951. Receipts from producers at pool plants increased from 198 million pounds in 1951 to 373 million pounds in 1955. During the same period receipts from producers in nonpool plants declined from 583 million pounds to 466 million pounds. Likewise, from 1951 to 1955 the number of producers in Northern New Jersey delivering to pool plants increased from 864 to 1,313 while those delivering to nonpool plants declined from 2,277 in 1951 to 1,542 in 1955.

The 839 million pounds of milk received in 1955 from producers at plants in Northern New Jersey is equivalent to about 65 percent of the total fluid sales of 1,282 million pounds in Northern New Jersey. However, only a portion of the 839 million pounds was used for fluid sales in Northern New Jersey. About 75 percent of the 373 million pounds of milk received at pool plants in Northern New Jersey was utilized outside Northern New Jersey, primarily in the present marketing area. Some of the milk received at nonpool plants in Northern New Jersey also was used for other than fluid sales in Northern New Jersey. Evidence in the record is somewhat contradictory and [4197] inconclusive as to proportion of the milk received at nonpool plants in Northern New Jersey which was used for fluid sales in Northern New Jersey. If, as appears to be the case, about 83 percent or 387 million pounds of the 466 million pounds received at nonpool plants in Northern New Jersey was used for fluid sales in Northern New Jersey, there were 895 million pounds or about 70 percent of the milk for fluid use in Northern New Jersey which came from other sources and to which minimum prices established by the New Jersey Office of Milk Industry did not apply. Milk from Order No. 27 pool plants, mostly located in New York and Pennsylvania, classified as being used for fluid use in Northern New Jersey (Class I-C) amounted to 367 million pounds, an amount equivalent to about 29 percent of the total fluid sales in Northern New Jersey. Shipments of fluid milk to Northern New Jersey were about 276 million pounds from nonpool plants in the State of New York and about 273 million pounds from nonpool plants in

Pennsylvania, these volumes constituting an amount equivalent to 42 percent of the total fluid milk sales in Northern New Jersey. In addition, a relatively small volume of fluid milk (about 89 million pounds) came into Northern New Jersey from plants in Delaware and Maryland, from Pennsylvania plants not regularly shipping to Northern New Jersey and from plants subject to the Philadelphia order (No. 61). These aggregate volumes, totaling about 1,392 million pounds, exceed the 1,282 million pounds of fluid sales in Northern New Jersey by 110 million pounds, and is the apparent volume of milk in Northern New Jersey from these sources which was disposed of either in nonfluid use or for fluid sales outside Northern New Jersey.

During the period 1951-1955 a considerable shift occurred in relative importance of the various sources of milk for fluid use in Northern New Jersey. During this period, in terms of percentages of fluid milk sales in Northern New Jersey (1) receipts at non-Order No. 27 plants in Northern New Jersey declined from 51 percent to 36 percent, (2) Order No. 27 milk for fluid use in Northern New Jersey (Class I-C) increased from 20 percent to 29 percent, and (3) milk from unregulated sources outside New Jersey increased from 29 percent to 35 percent. Even if all of the Northern New Jersey produced milk subject to pricing by the Office of Milk Industry is allocated to fluid sales in Northern New Jersey, the volume of out-of-State unregulated milk and Order No. 27 I-C milk as sources of milk for fluid use was 247 million pounds greater in 1955 than in 1951, a volume equivalent to about 20 percent of the total fluid sales in Northern New Jersey, in 1955.

Milk for fluid use in Northern New Jersey was obtained from 17 nonpool plants in the State of New York. Milk was received at these plants from about 1,650 producers and was virtually all (99 percent) disposed of for fluid use, 90 percent of it (276 million pounds) being in Northern New Jersey.

Nonpool plants in Pennsylvania supplying milk for fluid use in Northern New Jersey include five plants in the Allentown-Easton area receiving milk from about 1,200

producers and 15 to 20 plants in central and northeastern Pennsylvania receiving milk from 2,000 to 2,500 producers. These plants in Pennsylvania received about 500 million pounds of milk from producers in 1955 of which about 88 percent was disposed of for fluid use. The plants in the Allentown-Easton area disposed of about 72 percent of their receipts from producers for fluid use, 13 percent being in Northern New Jersey. Other nonpool plants in Pennsylvania shipping milk to Northern New Jersey utilized about 98 percent of their receipts from producers for fluid use, 83 percent being in Northern New Jersey.

Although a high percentage of the milk received from producers at these nonpool plants in New York and Pennsylvania shipping milk into Northern New Jersey was all for fluid use, the prices received by farmers delivering milk to these plants (except those in the Allentown-Easton area) were about the same as the Order No. 27 uniform price in the same locality. These nonpool plants in New York and Pennsylvania from which milk is shipped into Northern New Jersey are scattered generally throughout the same area in which Order No. 27 pool plants are located and both types of plants compete directly for supplies of producer milk. In the Allentown-Easton area, prices received by farmers are comparable with or slightly higher than prices paid both at pool and nonpool plants in Northern New Jersey with which they are in competition for milk. In 1955 the price received by producers at nonpool plants in the western counties of Northern New Jersey exceeded the Order No. 27 uniform price by 36 to 39 cents. However, premiums over the minimum uniform prices were paid by pool handlers at plants in these Northern New Jersey counties in amounts bringing actual payments to producers to about the same level as at nonpool plants in the same counties.

Milk shipped from unregulated plants in New York and Pennsylvania into Northern New Jersey for fluid use not only constitutes a relatively high percentage of receipts from producers at those plants but also the seasonal pattern of such shipments closely corresponds to the seasonal pat-

tern of receipts from producers. Milk sold for fluid use in Northern New Jersey from nonpool plants in the State of New York in 1955 varied from a low of 16 million pounds in August to 29.5 million pounds in May. Milk sold for fluid use in Northern New Jersey from unregulated plants in Pennsylvania in 1955 varied from a low of about 16 million pounds in November to approximately 24 million pounds in March. However, some of the unregulated plants outside the State of New Jersey utilize a relatively large proportion of their receipts for fluid use outside of Northern New Jersey in regular and uniform volumes and ship into Northern New Jersey only that milk which is in excess of that regularly sold for fluid use outside Northern New Jersey. Such shipments into Northern New Jersey vary in amount seasonally depending upon seasonal variation of receipts from producers and constitute a method of dumping seasonal surpluses onto the Northern New Jersey fluid market.

The relatively uniform seasonal requirements for fluid use in Northern New Jersey are balanced from supplies obtained from Order No. 27 pool plants. The seasonal pattern of sales of Class I-C milk for fluid use in Northern New Jersey varies inversely with the seasonal pattern of receipts from producers and of shipments to Northern New Jersey from unregulated plants. In 1955 sales of I-C milk in Northern New Jersey ranged from a low of 21 million pounds in May to a high of nearly 41 million pounds in August and averaged 38 million pounds during the period August through November. In this manner, the seasonal surplus for Northern New Jersey is borne largely by Order No. 27 producers. Not only does the absence of effective regulation in Northern New Jersey result in a wide variation in the price at which milk is obtainable for fluid use, but also in an uneven distribution among producers of the burden of surplus associated with fluid sales in Northern New Jersey.

One of the large sources of disorderly marketing conditions in Northern New Jersey is the wide variation in prices at which milk is available for fluid use in Northern New Jersey. The New Jersey Office of Milk Industry's

Class I price applicable to a portion of the supply for fluid use in Northern New Jersey averaged $5.58 in 1955. Order No. 27 handlers account for milk for fluid use in Northern New Jersey at the Class I-C price which in 1955 averaged $4.16 for 3.5 milk in the 201-210 mile zone. For milk received at unregulated plants in New York and Pennsylvania and sold for fluid use in Northern New Jersey producers are paid a price equivalent to, or slightly above, the Order No. 27 uniform price which in 1955 averaged $3.96 for 3.5 milk in the 201-210 mile zone. This wide variation in prices at which milk is available for fluid use in Northern New Jersey has resulted, as previously indicated, in the procurement of increasing proportions of the milk supply for Northern New Jersey from the lowest priced sources and in a corresponding reduction in the volume of milk for which a full Class I-A price is returned to producers.

Northern New Jersey (and similarly Upstate New York is discussed elsewhere herein) consumes large quantities of milk all of which comes from a common production area serving both Northern New Jersey and the present marketing area, either from pool plants or from nonpool plants with which pool plants are intermingled throughout the production area. The present program of milk regulation in the New York milkshed involves establishment of a relatively high price for fluid milk disposed of in the present marketing area while at the same time does not provide a means of establishing a similar price for milk disposed of for fluid use in other centers of urban population, the largest of which is Northern New Jersey, which depend [4198] upon the New York milkshed for a supply of milk. Regulation in Northern New Jersey is necessary in order that the entire cost of the milk regulatory program for the maintenance of orderly marketing conditions in the entire area is paid not only by consumers in the present marketing area while the benefits of such a program accrue equally to the consumers in other urban centers of population depending upon a common milkshed for its supply of milk.

The marketing conditions (herein described) which have developed and prevailed both in Northern New Jersey and

in Upstate New York detract from the effectiveness of the milk price regulatory program for the milkshed and tend to preclude full and complete effectuation of its purposes. The adoption of effective regulation in Northern New Jersey is justified not only for the purpose of correcting existing disorderly conditions in Northern New Jersey but as a means of more effectively accomplishing the purposes and objectives of the present program of regulation in the New York area.

A substantial part of the milk supply for Northern New Jersey moves into Northern New Jersey from plants in several other States in the region. Packaged milk is distributed in Northern New Jersey from plants in New York and Pennsylvania and into the State of New York from plants in Northern New Jersey. In addition, there are several handlers engaged in distribution both in Northern New Jersey and in the presently defined marketing area under Order No. 27. The handling of all of the milk in Northern New Jersey which is proposed to be regulated clearly is in the current of interstate commerce, or substantially affects interstate commerce in milk and its effective regulation.

One of the issues under consideration at the hearing was whether a separate milk marketing order should be issued for Northern New Jersey (if there is need for any regulation) or whether regulation in Northern New Jersey should be accomplished under a single milk marketing order applicable both to Northern New Jersey and to the present marketing area under Order No. 27, together with additional territory in the State of New York. Evidence was presented at the hearing with respect to terms and provisions of a separate order for Northern New Jersey and also on terms and provisions of a single order applicable to the entire territory for which regulation was proposed.

The territory consisting of Northern New Jersey, the present Order No. 27 marketing area and additional territory in Upstate New York possesses the essential characteristics of one market for milk, rather than two or more. The densely populated region consisting of New York City and

surrounding urban territory together with the major cities and their environs in Northern New Jersey constitute a contiguous urban area from the standpoint of general economic integration and interdependence. Milk for this entire territory is produced in a common production area. Plants and producers supplying milk for all parts of the territory are extensively intermingled and to a substantial degree the milk is interchangeable between the various portions of the territory. Applicable health authority requirements for milk are substantially uniform throughout the area with no variations of sufficient magnitude to require a division of the territory for purposes of price regulation the same distributors are extensively engaged in milk distribution in Northern New Jersey, in the present marketing area and in Upstate New York. Members of cooperative associations of producers in the production area, including the majority of producers in Northern New Jersey, deliver milk to plants supplying milk to all parts of the consuming area.

Orderly milk marketing conditions, the establishment and maintenance of which is the primary purpose of Federal milk marketing orders issued pursuant to the Agricultural Marketing Agreement Act, may be insured only by establishment of minimum class prices for milk which are uniform among handlers and by provision for equitably sharing among producers the returns from fluid sales together with the lower returns obtainable for both the long-time and seasonal reserve supplies.

The proposal of the proponents of a regulatory program by means of separate orders does not constitute an acceptable program for attainment of the basic purposes of regulation both for the presently regulated marketing area and for the proposed separate Northern New Jersey area. The separate order proposed for Northern New Jersey together with the proposed coordinating amendments to Order No. 27 did not insure close alignment of minimum class prices under the two orders and did not provide for equitable sharing of the returns from the sale of fluid milk and from reserve supplies equitably among all producers

in the territory supplying both Northern New Jersey and the present New York marketing area. The separate order program proposed for Northern New Jersey was drawn in a manner which would limit the volume of reserve supplies of milk in the pool to a greater extent than they were proposed to be limited under Order No. 27, and thus would tend to accentuate rather than to eliminate the existing inequitable distribution of returns to producers in the milkshed. The condition presently prevailing is that the long-time reserve supplies of milk both for the present marketing area urban territory in Upstate New York and for Northern New Jersey as well as the short-time reserve supplies are carried in the Order No. 27 pool.

Stable and orderly marketing conditions throughout the common production area serving a single market require provisions of a regulatory program providing for a degree of uniformity of pricing and pooling readily obtainable under a single order but not obtainable under the separate orders proposed for consideration at the hearing. Such separate orders dividing a basically single market for purposes of regulation inevitably would create incentives for uneconomic handling of milk supplies in the production area to the ultimate disadvantage both of producers and consumers, and inevitably would result in the creation of artificial "intermarket" and interorder problems and in continuing endless controversies over such artificial problems which under a single order would not exist. Administrative problems would be significantly greater if the regulation was in the form of separate orders rather than in the form of a single order. The objectives of regulation are susceptible of accomplishment more surely and effectively under a single order than under separate orders.

There is no sound economic justification for regulation providing for differences in prices to neighboring producers in the common production area with such differences depending solely upon whether the milk is for consumption in Northern New Jersey or in New York City, or upon whether the handler operating a particular plant chooses

to operate in a manner making the milk subject to one order rather than the other.

It was argued by proponents of a separate order for Northern New Jersey that the present Order No. 27 pool contains unneeded and unwanted reserve supplies of milk, the burden of which should in no way be borne by producers supplying milk for Northern New Jersey. However, there is no basis in the record for determining that the existing reserve supplies are any less associated with Northern New Jersey than with the present Order No. 27 marketing area or other urban consuming centers in the milkshed. The increase in the supply of milk in the milkshed relative to total fluid milk sales in the entire region which has developed since 1948 has been accumulated in the Order No. 27 pool as a logical economic development resulting from the absence of any comparable regulation for Northern New Jersey with provisions for marketwide equalization. During this period of time, deliveries of milk to dealers' plants have increased both in Northern New Jersey and in the production area outside New Jersey from which milk is supplied both for Northern New Jersey and the Order No. 27 marketing area. From 1948 to 1955 deliveries of milk to handlers' plants in Northern New Jersey increased 26 percent compared to increases in the State of New York (outside the Rochester and Buffalo areas) and in the State of Pennsylvania of 27.5 and 32.6, respectively. During the same period average deliveries per day per dairy in Northern New Jersey increased 44 percent compared to an increase of 33 percent for all producers delivering to Order No. 27 pool plants and 51 percent for producers delivering to plants under the Philadelphia Order (No. 61).

One of the reasons advanced by proponents for a separate order for Northern New Jersey was that otherwise the interests of New Jersey producers would receive only incidental and secondary consideration since they were a small minority of the total number of producers whose milk would be subject to regulation under a single order for the combined New York-New Jersey area. It was argued that under a single order proposals advanced by New Jersey producers

for order provisions designed to [4199] protect the interests of such producers would be likely to be voted down in a milkshed-wide referendum. The facts in this connection are that provisions of a milk marketing order are those found by the Secretary to be justified on the basis of evidence in the record of public hearings irrespective of whether such facts are presented by a majority or minority group of producers or are presented by other interested parties. The vote of producers whose milk is subject to regulation under an order is controlling as to whether or not an order containing the terms and provisions found to be justified by the Secretary is to be issued, but not as to specific terms and provisions of the order.

This argument for a separate order for Northern New Jersey appears to have been based primarily on the conception of Northern New Jersey as a separate production area rather than as a consuming area. Production conditions in Northern New Jersey have been compared in connection with this argument with production conditions in the territory in which milk is produced under Order No. 27. Actually under a separate order for Northern New Jersey, a majority of the milk subject to regulation under such an order would be produced on farms located outside the State of New Jersey, and unless a substantial adjustment in the present marketing pattern occurred, the milk of a majority of the producers located in Northern New Jersey would be regulated under provisions of Order No. 27. The legitimate interests of resident New Jersey producers are much more comparable with the interests of nearby producers whose milk is presently regulated under Order No. 27 than they are with the majority of the producers whose milk currently is being marketed in Northern New Jersey.

*Analysis—Upstate New York.*[1] The territory in Upstate

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[1] [In connection with the following analysis, it should be noted that:

(1) Milk received by local dealers from pool plants and classified as Class I-C, and milk received from nonpool plants approved for and engaged primarily in serving either New Jersey or New England, has been considered to have been used as fluid milk by the

New York proposed to be included in the marketing area (herein defined as "Upstate New York") is all within the New York milkshed. There are one or more pool plants in each of 28 of the 35 counties in Upstate New York. The seven counties (Albany, Schenectady, Saratoga, Warren, Fulton, Rockland, and Putnam) in which there are no pool plants are largely urban or resort areas, and in each case adjoin two or more counties containing pool plants near their borders. In 1955 about 20,000 producers delivered milk to Order No. 27 pool plants in the territory, and less than 5,000 producers delivered milk to plants of local distributors. Population of the area is approximately 3,100,000 and the volume of fluid milk sales in the area in 1955 amounted to 915,817,000 pounds. The figures for both population and milk consumption are about 30 percent of the

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local dealer. This results in the maximum possible allocation of local producer milk to uses other than for distribution as fluid milk.

(2) Shipments of milk from local dealers in one district to local dealers in another district have not been considered. Accordingly, the determined volume of milk used in any one district for other than fluid use may be slightly inaccurate. For example, shipments of milk from the Mohawk Valley District to dealers in the South Central District will appear as "other uses" or "surplus" in Mohawk Valley District. Such milk has not been treated as a receipt in the South Central District, and thus the amount of "other uses" in that district may be understated if such milk actually was used for fluid distribution.

(3) Premiums paid in 1955 by local dealers were computed by adding the weighted average premium for other than butterfat to the simple average base price for 3.5 milk paid by local dealers and subtracting the simple average Order No. 27 uniform price for 3.5 milk in the 201-210 mile zone adjusted for a representative location in the district.

(4) Prices paid by local dealers for milk purchased from farmers other than on the basis of a butterfat test were not considered in calculating premiums paid.

(5) Milk of dealers own herds has been added to purchases from producers in calculating the total volume of milk received from producers.

(6) Special problems relating both to flat price purchases and to producer-dealer or own herd milk will be considered at a later point.]

corresponding figures for the present marketing area. Of the milk consumed in the area, 181,292,000 pounds, about 20 percent, was Class I-C from Order No. 27 pool plants, and 33,980,000 pounds, or about 4.0 percent, was from nonpool New Jersey or New England approved plants located in the New York milkshed. The remainder, or 76 percent, was from local producers delivering to local pasteurizing and bottling plants. Of the milk received from local producers in 1955, 83 percent was used as fluid milk (including 3 percent sold out of the State) and 17 percent was used for other purposes, including fluid cream.

The seasonal pattern of receipts of milk from producers at plants of local dealers tended to be more uniform than the average receipts from producers delivering to pool plants in the vicinity. In general, the number of producers delivering to local plants was smaller in the surplus season than in the season of short production or at times when the local population was increased in the resort area. A reverse seasonal variation prevailed in the number of producers at pool plants in the same district. Prices paid to producers for the local Upstate markets generally have followed the Order No. 27 uniform price as far as major changes are concerned, but in most districts some premiums over the uniform price have been paid with variations in amount between districts.

The majority of producers for Upstate local markets are not members of milk marketing cooperatives. Those cooperatives with membership serving local markets also have producer members at Order No. 27 pool plants. The producer organization with the largest number of members, both under Order No. 27 and in Upstate local markets is the Dairymen's League Cooperative Association, Inc. Another large producer cooperative is Crowley's Milk Producers Cooperative Association, all of whose milk is received at pool plants, but much of which is distributed in various Upstate markets. The New York State Guernsey Breeders' Cooperative, Inc. operates a pool plant at Syracuse at which milk is received from its members and also from which milk is shipped in bulk to the present marketing

area and also is distributed locally in Syracuse. This cooperative also operates a pool plant at West Coxsackie from which milk is sold for distribution in the present marketing area and in Northern New Jersey.

Dealers distributing milk in the Upstate areas are to a considerable extent also handlers under Order No. 27. The Dairymen's League Cooperative Association, Inc., is an important handler with distribution facilities in all parts of the Upstate area as well as in the present marketing area. Members of that association deliver milk directly for distribution in local Upstate markets and also deliver to pool plants supplying Class I-C milk to various parts of the area. That association also transfers producers back and forth between pool and local nonpool plants in the process of balancing supplies and fluid requirements in local Upstate markets.

There are 14 pasteurizing and bottling plants in the Upstate area which are Order No. 27 pool plants. Some of these plants distribute milk locally and ship bulk milk to the present marketing area and to manufacturing plants. Others supply bottled milk both to local markets and to New Jersey, and also to the present marketing area.

Sanitary requirements for the production and handling of milk for fluid use are generally uniform throughout the milkshed. Provisions of the Sanitary Code of the State of New York applicable to milk and cream (Chapter III) apply in all parts of the State except the city of New York, and are applicable to the counties of Nassau, Suffolk, and Westchester in the present marketing area. Even though the State Sanitary Code does not apply to the city of New York, a high degree of similarity is apparent since in many instances plants and producers are approved both by the New York City Department of Health and by Upstate health authorities. Supply sources are interchangeable to a high degree throughout the present and proposed extended marketing area. Provision of New York State law under which local health authorities may approve only those plants and producers which are approved by the Commissioner of Agriculture and Markets are not construed so as

to result in restricting the interchange of milk supplies among various areas of the State within a marketing area in which the handling of milk is regulated under a marketing order providing for uniform producer prices and equalization.

All 17 of the nonpool country receiving stations and country bottling plants in the State of New York which are approved for sale of milk in New Jersey (these plants are hereinafter referred to as New Jersey approved plants) are located in the Upstate area under con- [4200] sideration. These plants are scattered throughout the Upstate territory and are located in six of the seven districts as follows: Four are in the Nearby District, two are in the Capital District, two are in the Syracuse District, three are in the Binghamton District, two are in the Elmira District, and four are in the South Central District. Only in the Mohawk Valley District (Utica-Rome being the largest urban center) are there no New Jersey approved plants.

Prices paid by these New Jersey approved plants were about the same as the prices paid at Order No. 27 pool plants in the vicinity although practically all (over 99 percent) of the milk received from farmers at these plants was disposed of for fluid use. Of the milk disposed of for fluid use, 90 percent was in New Jersey; 8.0 percent in Upstate New York and 2.0 percent in other areas.

Practically all of the sales in the State of New York from these New Jersey approved plants were in the proposed marketing area extension and were equivalent to about 14 percent of the Class I-C milk sold in the same area. Two of the plants are pasteurizing and bottling plants from which packaged milk is sold in Upstate New York as well as in New Jersey, and probably account for a high percentage of the milk sold in Upstate New York by this group of plants as a whole.

There are nine nonpool plants in the Upstate New York area which are engaged primarily in supplying markets in New England. Seven of these were formerly Order No. 27 plants and two are currently Boston pool plants. In contrast to the New Jersey approved plants which are scattered

throughout the Upstate area, these New England approved plants are concentrated in the eastern portion of the milkshed. Seven of the nine plants are in districts bordering New England, and six of the nine are in counties bordering New England. The three plants not in counties bordering New England are operated by the Dairymen's League Cooperative Association, Inc., with one plant in each of the counties of Greene, Herkimer, and Oneida. The Oneida County plant was an Order No. 27 pool plant in 1955 except for one month. The Herkimer County plant was in the pool in 1955 except for four months.

Approximately 88 percent of the milk received from producers at these New England approved plants in 1955 was disposed of for fluid use and 12 percent for other uses. This 12 percent, however, was mainly, if not entirely, milk pooled under the Boston order. Less than 1.0 percent of the fluid milk sold was for other than New England markets, the major part of which was sold in the Nearby District, and the balance in the Capital District and was equivalent in volume to about 1.0 percent of the Class I-C milk sold in these districts.

All parts of the territory in Upstate New York proposed for inclusion in the marketing area bear the same general relationship to the metropolitan New York market as does the territory as a whole, but the importance of different factors varies to some degree among the districts.

1. *Nearby District.* The Nearby District consists of the counties of Rockland, Orange, Sullivan, Ulster, and Greene on the western side of the Hudson River and Putnam, Dutchess, and Columbia Counties on the eastern side of the river. This territory contains the cities of Poughkeepsie, Hudson, and Beacon on the eastern side of the river; and the cities of Kingston, Newburg, Middletown, and Port Jervis on the western side. Rockland County, the nearest to New York City, is largely urban in character and an integral part of the New York-New Jersey metropolitan area. The major part of the Catskill Mountains resort area is also included in this district. The total population of the district is 665,800.

This district is an important milk production region. There are in the neighborhood of 2500 producers delivering milk to pool plants in the area, and this is the area where most of the farms delivering milk directly to the present marketing area are located. There were less than 400 producers delivering milk to nonpool local plants in the district in 1955. Fluid sales in the district amounted to 202,439,000 pounds in 1955. Of this, 112,841,000 pounds, or 56 percent, was Class I-C milk from Order No. 27 plants. This Class I-C milk also represented about 56 percent of the total Class I-C milk disposed of in the State of New York. A maximum of 16 percent of the milk received from farmers at local nonpool plants in the district was used as other than fluid milk.

This area is one in which location differentials under the order are applicable to part and not applicable to other parts. Consequently, it is difficult to determine the exact amount of premiums applicable to local milk as compared with pool milk. In the district as a whole, local dealers apparently paid about 20 cents more than pool plants paid.

In general, premiums over the Order No. 27 uniform price were paid at pool plants. Prices paid by local dealers over the Order No. 27 uniform price varied widely within the district.

In Columbia County in 1955, the price paid by local dealers was about the same as the Order No. 27 uniform price. In Sullivan County the price paid was about 13 cents above the uniform price. In Ulster and Dutchess Counties, local dealers paid about $1.00 more than the Order No. 27 uniform price. In Orange County they paid about 65 cents over the Order No. 27 uniform price. In the area east of the Hudson River, the local dealers and the pool plant operators both are competing for producers with Connecticut buyers. In the area west of the Hudson, New York dealers are competing with New Jersey buyers.

The district contains eight Order No. 27 pool plants which pasteurize and bottle milk, six of these being on the west side of the Hudson and two on the east side. In addition, there is on the west side one nonpool plant which is pri-

marily a pasteurizing and bottling plant for Northern New Jersey but which also supplies bottled milk for local distribution. Some of the primarily local distributors also have some distribution in Northern New Jersey.

The pasteurizing and bottling plants in four counties west of the Hudson nearest to New Jersey (Rockland, Orange, Sullivan, and Ulster) supply about equal amounts of milk to Northern New Jersey and for local distribution. They supply the present marketing area with less than half as much milk as they supply for Northern New Jersey or for local distribution. Not taken into consideration in this computation, of course, is the utilization of milk by Order No. 27 country receiving and shipping plants in the district.

A contention was advanced at the hearing to the effect that most of the problems with which the hearing on the Upstate New York extension was concerned would be solved by expanding the marketing area to include only the nearby counties. While the problem of pricing a considerable part of the present Class I-C milk in New York State would disappear under such an amendment, a substantial part of the broader problem of more equitably distributing among all producers in the milkshed and among the important milk consuming areas depending on the New York milkshed for their supplies of milk the burdens and benefits of a milk price stabilization program would remain unsolved.

2. *Capital District.* This district consists of the counties of Albany, Rensselaer, Saratoga, Schenectady, Warren, Washington, and Essex. In it is the metropolitan area of Albany-Troy-Schenectady, and the resort areas to the north. Milk production is important only on the fringes of the area. There are two regular and two occasional pool plants in Washington County and one regular pool plant in Rensselaer County. The record does not reveal the number of producers delivering to these pool plants in 1955. In 1954, however, there were nearly 500 producers delivering to pool plants in Washington County. There are three pool plants in Essex County. As will be shown later, a substantial part of this county is not closely associated with the balance of the Capital District from the standpoint of

milk supplies and distribution. There were over 1700 producers delivering milk to local dealers in the Capital District in 1955. The record does not indicate precisely where all of these farmers are located, but some are located in the district and some in the rural areas immediately to the west and south. In 1955, 1058 producers delivered milk to pool plants in Schoharie County which borders Albany County on the west and which might be considered to be a part of the Capital District. Columbia and Greene Counties to the south each contain pool plants and producers, as does Montgomery County to the west of Schenectady. Although precise figures are not available it appears probable that within the area from which the milk supply for the Capital District is produced the number of producers delivering milk to pool plants is about double the number delivering to local plants in the Capital District.

The Capital District has a population of 762,300, the largest of any of the districts involved. Milk sales locally in the district amounted to 231,018,000 pounds in 1955. The sales of Class I-C milk [4201] amounted to only 1.0 percent of these sales. Milk from New England or New Jersey approved unregulated plants accounted for only 0.1 percent of sales. The balance came from local producers. About 20 percent of such local producer milk was used other than for distribution as fluid milk, a percentage slightly higher than for the Nearby District and about the same as for the Mohawk Valley District to the west.

Producers are shifted back and forth between pool plants and nonpool plants in greater numbers and as a larger percentage of total producers involved than in any other district except the Nearby District.

Average deliveries per producer in the Capital District increased 36 percent from the low month to the high month. Pool producers in the same district increased deliveries by 56 percent.

Prices paid producers in the Capital District generally followed the uniform price but at a higher level. In the years 1948 through 1954, the premiums ranged from a low

of 9 cents to a high of 61 cents and averaged 32 cents. In 1955, the premium was about 34 cents.

The Capital District draws upon the Order No. 27 pool for Class I-C milk less than other districts in the Upstate area. Balancing from pool supplies, however, is accomplished by shifting producers between pool and nonpool plants and by paying relatively high premiums to obtain the most desirable producers from the point of view of seasonal variation in production.

3. *Mohawk Valley District.* This district consists of the counties of Fulton, Montgomery, Herkimer and Oneida and includes the metropolitan area of Utica-Rome and the cities of Amsterdam, Johnstown, and Gloversville. The rural areas included in it are important dairy areas of the milkshed. The population is 417,000. Sales of fluid milk in the district amounted to 130,083,000 pounds in 1955.

More than 4,000 producers delivered milk to pool plants in the district while 750 producers delivered milk to local dealers in 1955. Seven percent, or 8,750,000 pounds of the fluid milk sales was New York Class I-C milk. Less than 1.0 percent was from New Jersey or New England approved plants and the balance was from local receipts. Of the milk received from producers, 20 percent was used as other than local or out-of-state fluid sales.

In the eastern section of the district prices to producers for the period 1949-1954 averaged nine cents over the minimum Order No. 27 uniform price. The producers delivering to local plants increased production from the low month to the high month by 29 percent as compared to an increase of 63 percent at pool plants in that section. In the western section of the district the price paid to local producers averaged 3 cents per hundredweight over the Order No. 27 uniform price. Deliveries per producer by local producers increased 40 percent from low month to high month. While pool producers increased deliveries by 76 percent.

Local dealers in this district with a much larger number of nearby producers to choose from were able to attract the more desirable producers by paying a much lower premium than could dealers in the more densely populated Capital

District. In 1955, the premium paid in the Mohawk District amounted to about 8 cents per hundredweight.

4. *Syracuse District.* This district consists of the counties of Madison, Onondaga, Oswego, Cayuga, and Cortland. It contains the metropolitan area of Syracuse in its center and the cities of Oswego, Auburn, and Cortland on its fringes. It is one of the important dairy areas of the State. The population is 622,400, the third largest of the Upstate districts. Fluid milk sales in 1955 amounted to 175,748,000 pounds. More than 4,500 producers delivered to pool plants in the district and 1,053 delivered to local dealers.

Seven percent of the fluid milk sales, or 12,544,000 pounds, was Class I-C milk. Only a fraction of 1.0 percent was milk from unregulated New Jersey approved plants. The balance was from local producers. About 18 percent of the milk from local producers was used for other than fluid milk sales. A plant of one of the larger distributors of milk in this area is an Order No. 27 pool plant.

In the period 1949 through 1954, the price paid to local producers averaged 4 cents more than the Order 27 uniform price. In 1955, the premium paid to local producers amounted to 15 cents per hundredweight. Average daily deliveries by local producers in 1955 increased by 32 percent from the low month to the high month. Deliveries of pool producers in 1955 increased by 59 percent from the low month to the high month. Here again, the premium to get the more even producers was low as compared with the Capital District.

On the petition of the Syracuse Milk Producers Bargaining Agency (made up of three cooperatives, two of which are members of Mutual Federation of Independent Cooperatives, Inc., a qualified federation under Order No. 27) hearings were held during the period 1954-1956 by the New York State Department of Agriculture and Markets on a State order for the Syracuse area (somewhat smaller in size than the area defined herein). On February 22, 1956, a meeting of producer leaders of the milk industry in New York, including representatives of Mutual met with State officials in the Governor's office. This group proposed that

a hearing be held to consider including the Upstate area in one order with the New York metropolitan area, but that issuance of a State order for Syracuse should not be deferred pending Federal-State action on the basis of such a hearing. Subsequently, the New York Commissioner of Agriculture and Markets issued an order for Syracuse to become effective on August 1, 1956. Before that date, he was stayed by New York Courts from making the order effective on the basis of an action started by Syracuse milk dealers, who at this hearing opposed the issuance of Federal-State regulation for the area.

The district is quite typical of the whole Upstate area. There is nothing in the situation which distinguishes it from other parts of the Upstate area, except for the formal consideration of a separate State order. If the design of a separate order is to provide a means for the local producers carrying less than their fair share of the milkshed reserve, it is incompatible with the objective of regulating the Upstate areas.

If it is designed to yield about what would be expected under one regulation through a competitive balancing of supplies through a constant shifting of producers back and forth, the separate regulation might cause unsettled marketing conditions rather than orderly marketing.

The fact is that a State order for Syracuse has not become effective. While it may have been understood that a State order for Syracuse would not be held up pending action on proposed Federal-State regulation, there appears to be no basis for deferring Federal-State regulation pending disposition of litigation on the State order.

It is concluded that the Syracuse District should be regulated together with other parts of the Upstate New York area.

5. *Binghamton District.* This district consists of Broome County and contains the Binghamton metropolitan area. The population is 200,600. Total fluid milk sales in the district were 67,593,000 pounds in 1955. Pool plants in the district received milk from over 700 producers and local dealers received milk from less than 300 other producers.

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The largest distributor of milk in this district is Crowley's Milk Company. Its Binghamton distribution plant is an Order No. 27 pool plant as are the several country receiving plants of this handler. In addition, the Dairymen's League is a principal distributor and supplier of milk in this district. In 1955, 27,086,000 pounds of Class I-C milk were marketed here. This was 40 percent of the total distribution of fluid milk. An additional 1.0 percent of the distribution was milk from unregulated New Jersey approved plants in the milkshed. Of the 27 million pounds of milk received from local producers, only 10 percent was for other than fluid uses.

In the period 1951-1954, the price paid to local producers in the Binghamton District averaged 4 cents over the Order No. 27 uniform price at plants in the area. In 1955, a premium of about 22 cents was paid. One cent of this was the result of a higher base price and 21 cents was a stated premium.

6. *Elmira District.* This district includes the counties of Tioga, Tompkins, Chemung, Schuyler, and Yates, and that part of Steuben County adjoining Elmira and including Corning. In addition to Elmira and its suburbs the district also includes the cities of Ithaca and Penn Yan. The population is 247,700. Fluid milk sales amounted to 69,473,000 pounds in 1955. Dairying is the principal type of agriculture of the area, and the area contains at least 12 pool plants receiving milk from more than 1500 producers. (There were 750 pool producers delivering to the five pool plants in the counties of Tioga and Chemung. The exact number of producers delivering milk to the remaining seven pool plants in the [4202] district is not indicated in the record.) There were less than 300 producers supplying local dealers in the district.

In 1955, 16 percent of the fluid sales were New York Class I-C milk. About a quarter of 1.0 percent was milk from unregulated New Jersey approved plants and the balance from local producers. The Dairymen's League is one of the principal distributors or suppliers of bottled milk in the area,

and a considerable part of their supply is from unregulated sources. Of the milk received from local producers, only about 7 percent was used for other than fluid milk.

In that part of the district consisting of the city of Elmira and its environs, local producers during the period 1949-1953 were paid an average of 14 cents per hundredweight over the uniform price. In 1955, there was practically no difference between the Order No. 27 uniform price and the prices paid by local handlers. The production of local producers varied seasonally only slightly less than did that of pool producers in the district, the variation being 47 percent for local producers and 53 percent for pool producers.

7. *South Central District.* This district consists of the counties of Delaware, Schoharie, Otsego, and Chenango. The district is distinctly rural, the largest city being Oneonta with a population of 14,300. Chenango, Delaware, and Otsego Counties are considered to be in the Binghamton trading area and Schoharie is considered to be in the Capital District trading area. The total population is only 166,300 and the fluid sales were only 39,463,000 pounds in 1955. There were about 6500 producers in 1955 who delivered milk to pool plants in the district and only an average of 176 producers who delivered milk to local distributors.

While only 6,529,000 pounds of Class I-C milk were sold in this district, the quantity was equivalent to 16 percent of the fluid milk sales. Nearly one-half as much was received from nonpool New Jersey approved plants. Practically all of the milk of local producers was used for fluid purposes.

Local producers received an average of 25 cents over the Order No. 27 uniform price in 1955. Of this 22 cents was paid to the farmer as a stated premium and 3 cents as a higher base price. The basis for this premium was not indicated in the record.

*Summary*—All Upstate New York Districts. All of the above described districts are in the territory from which milk is shipped to the New York metropolitan marketing area. A majority of the farmers in each of the districts delivers milk to Order No. 27 pool plants with a relatively

small minority delivering milk to local unregulated plants.

Each of the districts depends to a substantial degree on Order No. 27 pool plants for its long-time reserve supply and for much of its supply for seasonal balancing. Milk distributors accomplish this by one or more of the following methods:

(1) Buying milk directly from producers only to the extent that it can be used almost entirely for fluid milk in the period of flush production and supplementing this with with Class I-C milk from the pool in times of short supply.

(2) Taking on producers from pool plants at times when the dealer is short of milk and dropping them when the milk is not needed (this being supplemented at times by a taking a part of the production of certain pool producers, and thus, reducing the volume delivered to the pool plant, but not the number of producers).

(3) Operating a country plant so as to be in the pool for part of the year and out of the pool serving outside markets the remainder of the year.

(4) Selecting from the available producers at pool plants those whose seasonal production most nearly meets the requirements of the particular dealer.

The Order No. 27 uniform price is the principal price-making factor in paying producers selling to dealers in the Upstate area and accounts for all of the major and many of minor price fluctuations. In each of the districts some premium over the Order No. 27 minimum uniform price is paid, the amounts being determined by special price-making factors in various areas. In the area near New York City, which is the source of direct delivered milk to the present marketing area, and which is an area in which buyers of milk for Connecticut and New Jersey are competing for direct delivered supplies, the premiums are relatively high. These same factors, however, affect the actual paying prices at pool plants in the area.

Premiums paid by local dealers also are relatively high in the Capital District although not as high as in parts of the Nearbly District. Large urban cities in the Capital District are a considerable distance from areas of intensive

milk production and a relatively large proportion (about one-third) of the producers near enough for easy direct delivery of milk are required to provide the regular milk supply for the district. In other districts where intensive milk producing areas are closer to urban centers, and where a smaller proportion of the producers near enough for easy direct delivery are needed, the premiums paid by local dealers are relatively small.

Except for the South Central District, a relatively high proportion of the territory in all districts is urban or suburban in character and the urban population constitutes a relatively large proportion of the total population. The South Central District is more rural in character. Rural territories need not be excluded as a matter of principle. From a practical operating point of view, however, rural areas may contribute little to the purposes or effectiveness of the regulation and present an administrative problem out of proportion to the benefits to be gained. The South Central District is almost completely surrounded by the balance of the territory proposed for inclusion in the marketing area, the only gap consisting of three townships on the southern boundary of the district bordering the New York-Pennsylvania State line. Exclusion of the South Central District from the marketing area would increase the length of the extended marketing area boundary significantly by increasing by about 40 the number of townships in the area touching the boundary of the marketing area. Lengthening the boundary line to that extent also presents adminstrative and operating problems inevitably encountered in drawing marketing area boundary lines. On balance, a reduction in the length of the boundary line resulting from inclusion of the South Central District is desirable in the interest of minimizing boundary line problems.

Those portions of the New York milkshed in the State of New York outside that proposed for inclusion in the marketing area bear the same general relationship to the New York market and to the milkshed as do those proposed for inclusion. Such territory, however, includes few large cen-

ters of urban population, and its inclusion in the marketing area would not bring under regulation a significant additional volume of fluid sales. The largest city in western New York within the milkshed is Jamestown with a population of 44,400, and the largest in northern New York is Watertown with a population of 35,400.

All handling of milk proposed to be regulated in Upstate New York is in the current of interstate commerce or substantially affects interstate commerce in milk and its effective regulation.

*New or Amended Order.* On the question of whether a single marketing order should be issued in the form of an entirely new marketing order or by amending Order No. 27, it is concluded that the existing provisions of Order No. 27 constitute a suitable frame-work for appropriate regulation for the expanded area under a single order. Findings and conclusions are set forth elsewhere herein regarding terms and provisions of the order which should be amended and with respect to provisions which should be added to provide appropriate regulation for the expanded area. The provisions of Order No. 27, which over a period of nearly 20 years have proved to be satisfactory both from the standpoint of attaining the principal objectives of regulation and from the standpoint of administration, should not be abandoned or ignored. The dissatisfaction with the present regulatory program under existing provisions of Order No. 27 and the degree to which it has failed to promote orderly marketing conditions is associated with the fact that it has been applicable to the handling of milk only for a portion of the consuming area which relies upon the milkshed for a supply of milk. The absence of regulation applicable to the entire supply for Northern New Jersey is the major milk marketing problem which has existed in the New York-New Jersey area for a considerable period of time. Expansion of the marketing area as herein provided will eliminate the basic cause of dissatisfaction among producers and of such disorderly conditions as currently prevail.

*Specific boundary lines.* The boundary line of the terri-

tory which should be added to the present marketing area is one which is contiguous to the present marketing area and which includes the 13 counties in the State of New Jersey and the counties and townships in the [4203] State of New York comprising the seven districts heretofore defined, except for the following parts of such counties which should not be included:

A. In the State of New York:

1. All of Essex, except the townships of Moriah, Schroon, Crown Point, and Ticonderoga.

2. In Warren, the townships of Johnsburg, Thurman, and Stoney Creek.

3. In Saratoga, the townships of Day, Edinburg, and Providence.

4. In Fulton, the township of Stratford.

5. In Herkimer, the townships of Webb, Ohio, and Salisbury.

6. In Oneida, the townships of Forestport, Boonville, Ava, and Florence.

7. In Oswego, the townships of Redfield and Boylston.

8. In Cayuga, the townships of Sterling, Victory, Conquest, and Montezuma.

9. In Yates, the townships of Potter, Middlesex, and Italy.

B. In the State of New Jersey:

1. In Ocean, the townships of Lacey, Ocean, Union, Stafford, Eagleswood, Little Egg Harbor, and Long Beach including all boroughs set off therein.

(Other territory listed in the notices of hearing which should not be included consists of Hamilton County and the townships of Lewis, Leyden, and West Turin in Lewis County. These boundaries are those proposed at the hearing by the major proponents with the exception of the southern part of Ocean County, New Jersey, and in addition, include all of the South Central District and the remainder of Washington County in the State of New York.)

This boundary line has been drawn in a manner designed to constitute a line which (1) is specific and easily recognizable both by those who may be regulated and by the market administrator, and (2) minimizes competition between regulated and unregulated handlers on retail or wholesale distribution routes, either distribution inside the area by unregulated handlers or distribution outside the area by regulated handlers.

Proponents recommended that only the townships of Fort Ann, Kingsbury, Fort Edward, Greenwich, and Easton in Washington County be included in the marketing area. It appears, however, that presently regulated handlers, or handlers who will be regulated, and who are licensed for these townships and villages in Washington County are also licensed for sales in other townships and villages in the county. If only the above named townships were included in the area, regulated handlers would be in competition, either on their own routes or through sales to subdealers, with unregulated dealers in other parts of the county. Accordingly, it is concluded that all of Washington County should be included, thus eliminating competition between regulated and unregulated dealers in that county and preventing the possible loss by regulated dealers of present sales to subdealers who otherwise might choose to purchase from unregulated sources.

The northern and western marketing area boundary line in Essex, Warren and Saratoga Counties (excluding the previously listed townships in those counties) appears to be one resulting in the least amount of competition between regulated and unregulated dealers. The inclusion of all of Essex County would include territory which is predominantly rural and mountainous, and would extend the line to a point where a greater degree of competition would exist with dealers who primarily serve the counties of Clinton, Franklin, and St. Lawrence to the north but who also distribute down into the northern part of Essex County.

Well over half of the described boundary line consists of the State line between the State of New York and the

States of Connecticut, Massachusetts, Vermont, and Pennsylvania and between the States of Pennsylvania and New Jersey. The balance consists of county lines and township lines. All such lines are specific and easily recognizable.

The eastern boundary line extending from the northeast corner of Westchester County north along the New York State line to the northeast corner of Moriah Township in Essex County closely approaches the ideal from the standpoint of minimizing competition between regulated and unregulated handlers. There is little distribution across the State line into New England from plants in the State of New York and there are only three dealers east of the line (one in Connecticut and two in Vermont) who are licensed to distribute in the State of New York. Dealers' routes or sales to subdealers overlap county lines to a considerable degree, however, between the counties in the State of New York along the eastern border from Westchester north into Essex. A line extending west from any point on the eastern boundary south of Moriah Township in Essex County would result in considerable competition between regulated and unregulated handlers.

Sales by dealers located in the Glen Falls area extend north into those townships in Essex and Warren Counties proposed to be included, into Washington County to the east and into Saratoga County to the west and south where they overlap with sales of handlers located in the Albany, Schenectady, Troy, Amsterdam area. The three omitted townships in Saratoga County are essentially rural and the only dealers licensed to sell there are those who will be regulated. The three omitted townships in Warren County are also rural, and regulated handlers will compete there with producer-dealers and an unregulated dealer who purchases some or all of his supply from sources which will be regulated. Since the terrain of the surrounding area is mountainous, the procurement of milk for these towns from other than regulated sources seems unlikely.

Westward from Saratoga County, the northern boundary of the marketing area includes the more populous portions

of Fulton, Herkimer Oneida, and Oswego Counties (omitting the townships of Stratford in Fulton County, Salisbury, Ohio, and Webb, in Herkimer County; Forestport, Boonville, Ava, and Florence in Oneida County; and Redfield and Boylston in Oswego County). This line is the northern boundary of the territory in which the vast majority of sales are made by dealers located in the Syracuse and Utica areas. If the proposed area were extended farther north (within the limits of the notices of hearing) the marketing area would include territory which is predominantly rural and sparsely populated, and which is served by dealers whose sales are primarily in counties outside those included in the notices of hearing. For example, inclusion of the townships of Forestport and Boonville in Oneida County would necessitate including Leyden, West Turin and Lewis Townships in Lewis County since dealers located in these townships are also licensed for Forestport and Boonville. Dealers in the Lewis County townships are in competition with dealers located farther north in Lewis County and outside the scope of the hearing. Ava and Florence Townships are very sparsely populated with no reason indicated for inclusion in the area. Dealers in the Syracuse area have distribution extending northward into Oswego County in competition with Oswego County dealers except in Boylston and Redfield Townships. The line across Oswego County is the line of least competition with routes of dealers running south from Jefferson County to the north and also outside the scope of the hearing.

The western boundary line of the marketing area extending from the western border of Oswego County irregularly south to the Pennsylvania line just west of Elmira also is the line of least competition between dealers east of the line and those who are primarily associated with centers of population west of the line. The townships in Cayuga County west of the boundary line are sparsely populated. There are no dealers licensed for two of the excluded towns and the only dealer licensed for the remaining two is located in the

city of Oswego and would be regulated. To include all of Cayuga County would extend the line to a point where there would be a greater degree of overlapping of routes with dealers in Wayne County.

The townships of Potter, Middlesex and Italy in Yates County which are omitted are not heavily populated (1950 population of 455; 765; and 833, respectively). A dealer located in Canandaigua (Ontario County and outside the scope of the hearing) is licensed for Potter and Middlesex. There are no dealers licensed for Italy Township. The remaining townships in Yates County should be included in the marketing area as they are served by routes and subdealers of handlers who also have sales in the Elmira district. The boundary line in Yates County may result in some overlapping of distribution between regulated handlers and dealers in Ontario County, but appears to be the line across which there is the minimum amount of such overlapping.

The western border of Schuyler and Chemung Counties appears to meet the requirements for the marketing area boundary except that the townships of Addison, Erwin, and Corning in Steuben County also should be included in the marketing area. Some of the handlers located in these townships and who have [4204] sales there also distribute in Elmira, and handlers who are located in Elmira also have distribution in these three townships. Dealers licensed for the townships of Tuscarora, Thurston, Campbell, Hornby, Bradford, and Wayne will all be regulated. Only one dealer, who is located in Canisteo, is licensed for Rathbone Township. Extension of the line farther west in Steuben County would encounter difficulties with crossing of routes of dealers located in that area and who are primarily associated with areas to the west rather than with the Elmira district.

The marketing area boundary from east to west should be the State line between the States of New York and Pennsylvania from the point of intersection of the western boundary of Chemung County, New York, with the Pennsylvania State line to the point of intersection of the State lines of

New York, Pennsylvania, and New Jersey. This line properly reflects the point of least competition between regulated and unregulated dealers. There is some distribution by dealers in the Elmira and Binghamton Districts across the State line into Pennsylvania. This appears to present no serious problem, however, since milk sold by Pennsylvania dealers in Pennsylvania is subject to regulation by the Pennsylvania Milk Control Commission. There are relatively few dealers *in Pennsylvania* who are licensed to distribute in the State of New York. One dealer in Matamoras and one in Sayre, Pennsylvania, are licensed for New York State. One dealer in Troy, Pennsylvania, is licensed to sell only to other dealers in New York State.

As previously indicated, the marketing area boundary line is drawn so as to include the South Central District (eight townships in Madison County, five townships in Cortland County, and one township in Broome County). Presently regulated handlers, or handlers who will be regulated, have route sales and sales to subdealers in varying volumes throughout this district. For example, two large handlers, one in Binghamton and another in Homer are engaged in such distribution in much of the territory within the South Central District.

The township of Sanford in Broome County is served by one dealer who will be regulated and by one producer-dealer who also distributes in Delhi in Delaware County. Failure to include the South Central District would jeopardize the competitive position of regulated handlers with distribution there, particularly with regard to their sales to subdealers.

From the point of intersection of the State lines of New York, New Jersey and Pennsylvania, the marketing area boundary should be the State line between the States of Pennsylvania and New Jersey south to the point where the boundary line between Hunterdon and Mercer Counties in New Jersey intersects with the Pennsylvania-New Jersey State line. Sussex, Warren, and Hunterdon Counties should be included in the marketing area as there is considerable competition for sales in the three counties between

handlers and subdealers who have sales throughout the area in New Jersey proposed for regulation. Pasteurizing and bottling plants located in the three counties also have routes extending into other Northern New Jersey counties. Omitting Sussex, Warren, and Hunterdon Counties from the marketing area would result in placing the boundary at a point at which greater overlapping of routes would occur between regulated and unregulated handlers. There is some overlapping of routes of handlers located in New Jersey with those of handlers located in the State of Pennsylvania. However, the Pennsylvania-New Jersey State line appears to be the point of least competition between handlers who are expected to be regulated and those who are expected to be unregulated.

From the point of intersection of the Hunterdon-Mercer County line with the New Jersey-Pennsylvania State line, the marketing area boundary should extend eastward irregularly to the Atlantic Ocean and should then extend northward along the Atlantic Ocean-New Jersey coastline to the point of intersection with the present marketing area at the New York-New Jersey State line. This line consists of county boundary lines between Mercer County and Hunterdon, Somerset, Middlesex, and Monmouth Counties and between Burlington County and Monmouth and Ocean Counties to the point at which the northern boundary of Lacey Township in Ocean County intersects with the Burlington-Ocean County line. From this point of intersection the marketing area boundary should follow the northern boundary of Lacey Township in Ocean County to the point where said line intersects with Cedar Creek and along Cedar Creek, which is the northeastern boundary of Lacey Township, to Barnegat Bay. From this point the marketing area boundary should extend to the center of Barnegat Inlet where it joins the Atlantic Ocean.

There is some overlapping of routes along this proposed southern marketing area boundary between handlers located south of the line and handlers located north of the line. Most of such overlapping occurs between handlers

located in Mercer County who have routes extending into Northern New Jersey and handlers located in Northern New Jersey who have routes extending southward into Mercer County. It appears, however, that the majority of such competition will occur between regulated handlers or between such handlers and those regulated by the New Jersey Office of Milk Industry. Within the scope of the notices of hearing, the marketing area boundary as drawn is at the point where the least competition occurs between handlers who will be regulated and those who will be unregulated.

The southern part of Ocean County is served substantially both by dealers in Northern New Jersey and by dealers who are associated with markets in Southern New Jersey and who are expected to remain unregulated if the southern part of Ocean County is not included in the marketing area. Routes of these Southern New Jersey dealers extend northward only to the line as drawn with the exception of one route which extends north into the proposed marketing area. Accordingly, including all of Ocean County in the marketing area would extend regulation to a point where there is a greater degree of overlapping of routes and would extend regulation to dealers who otherwise would be unregulated.

The marketing area extension herein defined is one in which regulated handlers have sales on routes, and sales to subdealers who have routes, that overlap in varying degrees throughout the districts previously defined in the State of New York and throughout the counties in Northern New Jersey. Regulated handlers have distribution in each of the six nearby counties and extend to the north into Greene and Columbia Counties. Routes of dealers in the Capital District run south into Greene and Columbia Counties. Dealers in the Capital District also have sales on routes and sales to subdealers to the west, where they overlap with those extending east from the Mohawk District. Utica dealers compete with dealers from Syracuse in the area between these two urban areas. Syracuse dealers' sales extend into Cayuga County where they overlap with

those from Auburn dealers and also extend into Cortland County where their distribution overlaps with that of dealers in Homer and in Binghamton. Distribution of route sales and sales to subdealers also overlap between Elmira and Binghamton dealers. A dealer in Homer has sales to subdealers who have wholesale and retail routes in Sullivan County, in the Nearby District.

Handlers who are presently regulated also have extensive sales of varying volumes throughout the proposed marketing area in Northern New Jersey and throughout the area proposed for regulation in Upstate New York. Also, several dealers located in Orange and Rockland Counties in New York process and package substantial volumes of milk for distribution throughout the Northern New Jersey area through subdealers. Likewise, several dealers in the New Jersey counties process and package milk for distribution in New York State through subdealers. In addition, there are some wholesale and retail routes which extend across the New York-New Jersey State line. One handler located at Homer, Cortland County, in the western part of the proposed extended marketing area in Upstate New York processes, packages and ships milk to subdealers in Northern New Jersey who distribute the milk throughout the Northern New Jersey counties.

The complete marketing area herein defined is a practicable one for effective regulation consistent with carrying out the declared policy of the act.

*Issue No. II (terms and provisions).* In view of the findings and conclusions on Issue No. I, the material issues relating to terms and provisions are concerned with amending the existing terms and provisions of Order No. 27 relating to the following:

1. Conditions under which milk is to be fully subject to the pricing and pooling provisions of the order (pool plant provisions), and provisions applicable to milk disposed of in the marketing area from sources not fully subject to

pricing [4205] and pooling under the order (peripheral milk and compensatory payments).

2. Provisions for the pricing of Class I-A milk, particularly as to changes in the present pricing formula:

(a) To reflect properly conditions resulting from extension of the marketing area and from the pooling of receipts and sales in the territory added to the marketing area; and

(b) To establish a price for Class I-A milk in the territory within the State of New York which is added to the marketing area at a lower level than for Class I-A milk elsewhere in the marketing area.

3. The classification and pricing of milk for fluid use outside the marketing area.

4. The classification and pricing of milk used for fluid cream (and other uses presently in Class II) both in the present marketing area and in territory added to the marketing area.

5. Whether provision should be made in connection with classification and pricing of Class III milk for, (a) establishing a price for Class III utilization at pasteurizing and bottling plants in Upstate New York lower than the price at other plants for such uses, (b) extending to all months (from March through July as presently provided) the classification in Class III under specified conditions of milk used in food products packed in hermetically sealed containers, and (c) separate pricing of skim milk used for nonfat dry milk depending upon the process used in manufacture.

6. Skim milk to which the fluid skim milk differential should apply and the amount of such differential.

7. Location differentials and mileage zones particularly as to:

(a) The method of determining mileage zones;

(b) Whether the present schedule of transportation dif-

ferentials should be changed either as applied to class prices or to producer payments.

(c) Whether provisions should be made for special location differentials (not directly related to differences in cost of transportation) for milk depending upon (1) location of the farms where it is produced, (2) location of the plant where it is first received, (3) whether it is delivered in cans or in bulk tank, or (4) whether or not delivery is made directly from farms to pasteurizing and bottling plants, and (5) the extent, if any, to which such differentials should be paid out of the pool rather than by the handlers who receive the milk.

8. Special pricing provisions relating to milk received on farm bulk tank pickup routes.

9. The basis of classification, particularly concerning (a) the plant at which classification is to be determined, and (b) allocation among sources and classifications.

10. Whether the order should be amended to provide for use of a base rating plan in making payments to producers, and if so, the terms and provisions of such plan.

11. The extent, if any, to which producer-dealers and milk from a handler's own farm should be exempt from regulation.

12. How regulation, particularly as to pricing and pooling, should be applied to milk purchased from producers on a flat price basis without testing for butterfat.

13. Whether provisions of the order for cooperative payments should be amended to provide such payments for a cooperative representing the interests only of nearby producers.

14. Such other amendments, incidental to those related to specific issues or for administrative purposes, as may be necessary to properly coordinate provisions of the order in its entirety.

Findings and conclusions with respect to these issues are as follows:

SECRETARY'S AMENDATORY DECISION IN 1957

1. *Pool plants and compensatory payments.* The basic features of the present pool plant provisions of the order should be retained but should be modified to provide that:

a. Plants which presently are expressly designated as pool plants continue to be so designated until such designation is cancelled pursuant to terms of the order.

b. Any other plant upon application of the operator, be initially expressly designated as a pool plant if 50 percent or more of the milk received directly from farmers during the period April 1956-March 1957 was disposed of for fluid use in any part of the extended marketing area, or if the plant was a pool plant on any basis in each of the months of April 1956 through March 1957.

c. Any plant not expressly designated initially be eligible to make application to the Secretary to be expressly designated only, (1) after it had been a pool plant on the basis of supplying the market for a period of 12 consecutive months immediately prior to the date of application, and (2) if such plant is located in one of the States of New York, New Jersey, or Pennsylvania, except that if located in Pennsylvania within 200 miles of Philadelphia, the plant is located either in a county adjacent to the marketing area or nearer to New York City than to Philadelphia.

d. Pool plant designations be cancelled at any time at the option of the handler but that no such plant could be a pool plant on any basis thereafter until it had remained a nonpool plant through a continuous period of April through June.

e. Any plant which is a pool plant in April, May, or June on the basis of supplying the market would continue to be a pool plant in any of the months of July through March following in which 60 percent or more of the receipts from producers is classified in Class I-A or Class I-B, except that any such plant would not be a pool plant in any such month upon advance notice to the market administrator, and thereafter could not be a pool plant on any basis

until after it had remained a nonpool plant through a continuous period of April through June.

f. Any plant at which milk is packaged and from which such milk is distributed in the marketing area, but which does not otherwise qualify as a pool plant, may at the option of the handler operating such plant be a pool plant in any month in which 55 percent or more of the milk received at such plant directly from farmers is classified in Class I-A or Class I-B, except that for a plant which otherwise would be subject to the provisions of another Federal order, the option of being a pool plant under this order could be exercised only if the percentage of its milk in Class I-A exceeds the percentage of its milk in Class I-B disposed of in the marketing area defined under the other Federal order.

Pool plant provisions of the order provide for identification of and determination by the market administrator of those plants at which milk received from farmers is to be fully subject to the pricing and pooling provisions of the order as distinguished from those plants at which milk received from farmers is to be entirely unregulated or is to be partially regulated by being subject to compensatory payments in the event of fluid disposition in the marketing area. All milk received from producers at pool plants is classified, priced and included in the computation of the uniform price. Handlers are subject to payments into or out of the producer settlement fund. Those handlers with a large percentage of fluid milk sales outside the marketing area try to keep such milk from being pooled to avoid payments into the producer settlement fund, and those with a high percentage of their milk in manufacturing uses frequently want such milk pooled in order to be able to receive payments from the producer settlement fund.

Pool plant provisions of the order for the expanded area should continue to provide for plants being determined to be pool plants either (1) on a continuing basis by being expressly designated (frequently referred to as reserve or permanent pool plants), or (2) on a month-to-month basis

depending upon whether specified percentages of the milk from such plants is disposed of for fluid use in the marketing area (frequently referred to as shipping plants or temporary pool plants).

Those plants expressly designated as pool plants should include those presently so designated, since they constitute sources of the regular and reserve supply associated with the present marketing area, and in addition should include those plants constituting sources of supply regularly associated exclusively with new territory being included in the marketing area or with the combination of that territory and the present marketing area. Thus, provision is made herein for expressly designating plants supplying the market in a substantial way during the year ending with March 1957.

Present provisions of the order relating to expressly designated plants do not impose requirements on such plants for shipping to or supplying the market with specified quantities of milk for fluid use, and no such provision should be added at this time. The designation of such plants, however, should continue to be subject to suspension and cancellation if the milk is not made available to the market when needed, and the necessary safeguards should be provided to avoid including plants in the pool which actually are engaged in handling reserve supplies of milk for other markets.

A substantial number of the plants which have become pool plants under the order during the past few years were [4206] formerly associated with other markets and at no previous time were sources of supply for the New York marketing area. A total of 56 plants were designated as reserve pool plants during the years 1949 through 1956. Of this total number, 21 of these plants had been pool plants sometime prior to 1949, but had been withdrawn from the pool to supply other markets during the period of generally short supply in the Northeast prior to 1949. The remaining 35 plants are plants which had not been pool plants at any time prior to 1949. Forty-four of the fifty-six plants

entering the pool since 1948 are located in New York, New Jersey, or northern Pennsylvania. Twelve of these plants are either located in Northern New Jersey or operated by handlers primarily engaged in supplying milk for Northern New Jersey. While the precise number is not indicated, others in this group of plants also were engaged in supplying fluid milk for Upstate New York and New Jersey. Thus, it is apparent that expansion of the marketing area as herein provided will eliminate a substantial part of the problem heretofore experienced of including plants in the pool which constitute actual or reserve sources of supply for consuming areas outside the marketing area.

While provisions should be made to guard against inclusion in the pool of reserve supplies for other markets, it also is important to provide for including in the pool on a expressly designated basis all plants which actually constitute the reserve supply for the market. Reserve supplies are of two types, one being the seasonal reserve needed only during the season of the year when production is the lowest but not needed at other times, and the second type being the long-time reserve supply which may be needed in some years and not in others. The handling and processing of the reserve supply of milk for the New York-New Jersey area takes place in a relative small number of plants. This pattern has developed because of the economy realized from specialization in the handling and processing of milk in nonfluid uses. The specialization which has developed in the handling and processing of reserve supplies of milk has developed in a number of different ways. The relatively few plants which are equipped for specialized manufacturing operations normally receive milk from a number of other feeder plants during the season of high production relative to fluid requirements of the market. As production decreases seasonally, the milk from feeder plants is diverted from the manufacturing plants to the market for fluid use while at the same time the milk received directly from producers at the manufacturing plants continues to be manufactured unless and until that milk also is needed for fluid use.

In some instances, this specialization in the manufacture of reserve supplies of milk takes place in only one or a few of several plants operated by a multiple plant operator. In other instances, the operations of a particular handler may consist of specialized operations utilizing reserve supplies of milk for manufacturing purposes and from which milk is sold for fluid use to other handlers only when the milk is needed for fluid use.

The economies associated with specialization in the handling and processing of reserve supplies for the market should not be destroyed by provisions under which plants are permitted to participate in the pool only if specified percentages of milk received from producers is disposed of for fluid use. Such provisions are illogical and unrealistic in this market where the milk supply is received from farmers at more than 400 plants in the production area. The imposition of rigid fluid shipping requirements applicable to all plants would leave plant operators no choice except to meet such requirements, and thus, such requirements would be ineffective in excluding milk from the pool, but would result merely in a less economical system of handling reserve milk supplies for the market. High shipping requirements also could induce destructive and disorderly price cutting among supply plants in a scramble to meet such requirements.

During the past several years plants located in New England and which formerly were pool plants under Order No. 27 have been withdrawn from the pool. Plants located in New England no longer constitute either actual or reserve sources of supply of milk for the marketing area. Accordingly, plants located in New England no longer should be eligible to be expressly designated under the order but, of course, may become pool plants if they choose to supply the market with milk for fluid use.

There are a number of plants in central and southern Pennsylvania which for a considerable period of time have been associated with the New York market and have been expressly designated pool plants. Other plants in that area, and also in Maryland and Delaware, have regularly supplied

milk for fluid use in Northern New Jersey. These plants should be eligible to be expressly designated as pool plants initially and should continue as such until the designation is cancelled by a request of the handler or for failure to supply the market with fluid milk when needed.

Plants located in Delaware or Maryland other than those eligible to be initially expressly designated have neither been regular sources of supply for Northern New Jersey nor have they been pool plants under Order No. 27 since the present pool plant provisions of the order became effective in 1945. Such plants were not regular supply sources for any part of the expanded marketing area prior to 1949 during the period of relatively short milk supplies in relation to fluid sales. It is to be expected that, as in the past, the milk from such plants, in the event of a recurrence of relatively short milk supplies, would be utilized for fluid purposes in consuming areas nearer to those plants rather than in the New York-Northern New Jersey marketing area. Accordingly, except for those plants in Maryland and Delaware eligible to be expressly designated initially, the area in which plants eligible to be expressly designated may be located should not be expanded to include Delaware and Maryland.

The same rule should apply, and for substantially the same reasons, to plants located in southern and central Pennsylvania within 200 miles from Philadelphia unless such plants are located in a county adjacent to the marketing area or nearer to New York City than to Philadelphia. Supply plants for the Philadelphia market are located in this central and southern Pennsylvania territory some of which are as much as 200 miles from Philadelphia, but closer to Philadelphia than to New York City. Numerous smaller centers of urbanized population scattered throughout this area also draw upon plants in the area for their fluid milk supplies. Plants located in this territory, as in the case of plants in Maryland and Delaware and other than those eligible to be expressly designated initially, would be expected to constitute sources of supply for local

markets in that area and for Philadelphia or other markets farther south rather than for the New York-Northern New Jersey marketing area in the event of a recurrence of relatively short milk supplies generally in the Northeast. Plants in this area (except as noted) accordingly are not plants which may reasonably be expected to constitute a reserve supply for the New York-Northern New Jersey marketing area and should consequently be included in the pool only on the basis of actually supplying the marketing area with fluid milk. As earlier indicated, there has been a tendency for plants in this portion of Pennsylvania to become pool plants under the order during the period of increased milk supply relative to fluid sales since 1948. A provision applicable to this territory in Pennsylvania precluding the express designation of additional plants is appropriate in view of past practices and in view of the fact that provision is made under the New York-Northern New Jersey order for marketwide equalization while no such provision is made under other regulation, including that for Philadelphia, applicable to milk in this area. Under such circumstances, there is a tendency for the reserve supply for such markets to be included in the only available marketwide pool.

Proponents of a single order for the entire New York-Northern New Jersey area proposed that plants expressly designated as pool plants be limited to those designated initially, and on a rather restrictive basis, and that thereafter no plants could be so designated. Proponents of a separate order for New Jersey and for amendment to Order No. 27 proposed that all plants under the Northern New Jersey order be required to meet relatively high fluid utilization requirements, and that additional expressly designated plants under the New York order be limited to those with a history of fluid disposition in the marketing area sufficiently large to have contributed to the pool over a 12-month period.

Although apparently designed for that purpose, these and other similar proposals regarding pool plant provisions

do not constitute an effective means for limiting pool volume. Any reasonable requirement for poor participation can and will be met if the incentive is suf- [4207] ficient. There is no authority for a provision which prohibits the sale of fluid milk in the marketing area from any plant. In a supply area as large as that required for the New York-Northern New Jersey market (or for either considered individually), producers can readily shift or be shifted from a plant not meeting pool plant requirements to one that does. To a significant extent, if necessary, milk can be shipped for fluid use from nonpool plants in sufficient volume to qualify them as pool plants while at the same time withholding milk from expressly designated plants and, as previously indicated, uneconomic handling of milk both for fluid and nonfluid uses would result from the imposition of high fluid utilization requirements applicable to all plants. Accordingly, pool plant provisions should be designed more particularly as a means of preventing disorderly in-and-out movement of plants and producers and to avoid the pooling of supplies not truly constituting a part of the actual or reserve supply for the market, rather than as a means of attempting to prevent participation in the pool of plants and producers so located that they reasonably may be expected to find a way to participate in the pool under any reasonable or defensible provision.

The order presently provides for the automatic cancellation of the designation of any plant as of August 1 which was not approved by a marketing area health authority on June 15. Such plants, however, may reapply prior to August 1, thus providing for a review by the Secretary once a year of the pool status of such plants. In order to continue such annual review, but at the same time to avoid subjecting such a plant to all of the requirements of a new applicant, the provision for automatic cancellation has been changed to automatic suspension. This will provide the plant operator an opportunity to avoid cancellation if he can show that he is maintaining sanitary control even though not actually approved on June 15. If no such show-

ing is made, however, and actual cancellation follows suspension, the plant then would become eligible for redesignation only under the same conditions as a plant applying to be expressly designated for the first time. No basis is found for favoring one type of plant over the other.

The amendments herein provided are designed to prevent continuation of some of the disorderly practices employed under present provisions of the order. The present provision permitting the cancellation of the designation of expressly designated plants at the option of the handler during the months of April through July has resulted in the practice of cancelling such designations immediately after the season of heaviest production. The amendment permitting cancellation of the designation of expressly designated plants at any time on condition that following such cancellation the plant could not be a pool plant on any basis until it had remained a nonpool plant through a continuous period of April through June is designed to discourage continuation of this practice.

Likewise, under present provisions of the order relating to the designation of plants on the basis of supplying the market with specified proportions of receipts from producers, the practice has developed of operating such plants so as to be pool plants in some months of the year and not in others. During the year 1956, the number of plants in the pool on the basis of supplying the market was higher during the months of April, May, June, October, November, and December than during other months. There were 18 plants in the pool on this basis in May and June and only 15 during the months of March, August, and September, and 12 in January and February. This in-and-out movement of plants constitutes one means of pooling the maximum amount of surplus milk handled at the plant and of keeping out of the pool the maximum amount of milk sold for fluid use in other markets. Practices of this type which result in the inclusion in the pool during a portion of the year of the reserve supplies for other markets should be discouraged.

Amendments provided for herein which are designed for that purpose are those:

(1) Requiring any plant included in the pool on the basis of suppyling the market in the surplus months of April, May, and June to continue to be a pool plant in any of the months of July through March following when a substantial proportion of the milk from such plants is being used for fluid use in other markets, or in the alternative excluding such plant from the pool until after the next period of highest seasonal production, and

(2) Requiring that a plant be in the pool on the basis of supplying the market for a 12-month period before being eligible to be expressly designated as a pool plant.

These provisions under which plants would be excluded from participation in the pool under specified conditions for a limited period do not mean, of course, that the disposition of such milk for fluid use in the marketing area would be prohibited. It could mean, however, that at least for a temporary period, milk disposed of from these plants for fluid use in the marketing area would be subject to compensatory payments if classified in Class I-A.

Compensatory payments are payments to the producer settlement fund on milk disposed of in the marketing area from plants which are not pool plants. They are designed to bring substantial equity between the handler and producer of pool milk and the handler and producer of nonpooled milk with respect to sales in the marketing area. The provision for partial regulation through compensatory payments makes it possible for a handler operating outside the marketing area to use the facilities of fully regulated plants for disposing of surplus milk not needed for markets outside of the area without imposing the financial burden of such surplus on producers in the marketwide pool. Compensatory payments also make it possible for a handler outside the marketing area to maintain small amounts of regular sales in the marketing area without subjecting his outside sales to full regulation.

One objective in drawing boundary lines of the marketing area is to minimize the amount of sales in the area from distributors whose primary business is outside of the area, and also to minimize the amount of distribution outside of the marketing area from plants located within the area whose business is primarily within the marketing area. Complete elimination of such competition, however, is impossible for the New York-Northern New Jersey area regardless of where the line is drawn. As a result, there will be located outside of the marketing area a number of handlers who primarily are supplying customers outside of the marketing area but who historically have served a few customers located within the area. These handlers usually have a relatively high percentage of their milk in fluid milk utilization. To the extent that they are selling milk within the area, they are competing for sales with handlers located within the area who are fully regulated by the order with respect both to pricing and pooling. Outside of the area, they are competing for sales primarily with handlers located outside of the area who are not regulated by the order. Such handlers located near the borders of the proposed marketing area who receive milk directly from farmes compete for producers with fully regulated handlers some of whose plants are located within the boundaries of the marketing area. Some of such handlers operating plants in the marketing area also have a fluid milk utilization considerably higher than the average utilization for the market as a whole.

Requiring such outside handler to be fully regulated would mean that he would be required to account to the pool at the full Class I-B price for all of the milk sold outside of the marketing area which is in competition with milk not subject to regulation under the order. Such a requirement for a dealer, whose business primarily is outside of the marketing area, could readily induce him to abandon his sales in the marketing area. Permitting a handler to continue to sell milk to customers in the marketing area without any form of price regulation would give

such handler a competitive advantage as compared to the handler whose primary business is within the area and who consequently is fully regulated.

A proposal was made that such handler outside the marketing area be required only to pay to his producers the utilization value of milk according to the class prices established under the order. That is, that he be required to pay for his milk on a handler pool basis rather than on a marketwide basis. It was contended that such a provision would provide equality between the pool handler and the nonpool handler because their required class prices would be the same. The handler in the area, however, has to equalize his utilization with other handlers, and his producers are paid on [4208] the basis of a uniform price reflecting the utilization in the market as a whole rather than the utilization of his handler. It would be inequitable to a handler in the marketing area to require him to equalize his utilization while letting a handler outside the marketing area avoid equalization on milk sold in the area. An unfair advantage would accrue to the nonpool handlers in competition for producer supplies, and the entire program of marketwide equalization would be in jeopardy. Although it is not the purpose of the order to bring complete equality between regulated and unregulated handlers, it should at least provide equity between such handlers with respect to milk sold in the marketing area both as to class prices and as to payments to producers.

Another proposal made was that the handler outside the marketing area be required to pay full compensatory payments provided for under the order on nonpooled milk sold in the marketing area. This would return to such handler a price which would enable him to pay his producers for that particular milk sold in the marketing area about what he could pay if he sold such milk to a manufacturing outlet. It would not, however, affect what he could return to his producers for the balance of his milk. In order not to give the handler located outside the marketing area and distributing a small amount of milk in the marketing area an

advantage over the fully regulated handler, and at the same time, to avoid placing such handler the major portion of whose sales is outside of the marketing area in competition with unregulated milk, at an undue disadvantage with his major competition, the order should provide that the outside handler have a choice of either pooling his entire receipts or of paying the full compensatory payment on his sales within the marketing area. The fully regulated handler in the marketing area is protected in either case, and the handler outside the marketing area is placed in a position of selecting whichever alternative is more favorable in his particular situation. Unless safeguarded, there is danger of this provision constituting a means of pooling surplus milk for other markets through token sales to the marketing area. Accordingly, only those handlers disposing of a substantial percentage of their milk for fluid use should be eligible to exercise the option of being fully regulated. Inasmuch as handlers, not presently regulated under the order and who distribute milk in the marketing area from plants outside the area, have relatively high fluid utilization a percentage requirement of 55 percent in Class I (Class I-A and I-B combined) will not disturb the status of handlers currently selling small amounts of milk in the marketing area, but will eliminate the danger resulting in token sales in the marketing area from plants not engaged primarily in the distribution of fluid milk. This option should not constitute a means by which plants otherwise regulated under another Federal order could jump back and forth between orders to obtain advantages over other handlers under one or both orders because of temporary price differences or to take advantage of differences in pooling provisions of the orders involved. Accordingly, the operator of a plant which except for this option would be regulated under another Federal order should be eligible to exercise the option only if the percentage of its milk in Class I-A exceeds its percentage of Class I-B milk disposed of in the marketing area defined under the other Federal order.

All handlers located outside the defined marketing area who sell milk in the marketing area would not be required, of course, to choose one of the alternatives heretofore described. Many dealers outside the marketing area who distribute milk in the area are operators of pasteurizing plants, or buy milk from pasteurizing plants whose source of milk is country plants rather than direct receipts from farmers. Some of this country plant milk is milk purchased from plants which will be fully regulated under the New York-Northern New Jersey order. Under the accounting procedure to be employed, milk received by the pasteurizing plants from pool plants will be allocated first to Class I-A milk distributed in the marketing area. Unless sales in the marketing area by the outside dealer exceeded receipts from pool sources, neither full regulation of the outside dealer nor an obligation to make compensatory payments would result.

Exceptions were taken to failure to eliminate provision for compensatory payments pursuant to the proviso of § 927.83 (b) (1). In support of the exception it was contended that the circumstances under which provision was made in 1953 for such payments (and the companion provision of Order No. 61) no longer exist primarily because of the marketing area expansion herein provided. It is found, on the contrary, that expansion of the marketing area or other changed conditions does not eliminate the need or basis for such payments. Discontinuance of provision for such payments would invite the resumption of practices and consequences prevailing prior to adoption of such provision. The factual situation most material in this connection is that the provision continues for marketwide pooling under Order No. 27 and for individual handler pooling under Order No. 61. Accordingly, such exceptions are denied.

2. *Class I-A price.* The major proponents of a single order proposed that no change be made in the present formula for pricing Class I-A milk and estimated the result to be an increase in the Class I-A price of about 49 cents

per hundredweight due to an expected increase in the percentage of total Class I milk in the pool. Other proposals were made that the formula be changed to reflect the expected increase in fluid utilization in such a way that the level of the Class I-A price would remain unchanged.

Concerning the level of the Class I-A price, it is found:

(1) That the Class I-A price level and the wholesale price level in relation to the cost of production index are within the ranges specified in the order, which ranges, if exceeded for more than three consecutive months, require the calling of a hearing to consider those and other economic conditions relating to the pricing of Class I-A milk, or a determination by the Secretary that such a hearing should not be held together with reasons therefor.

(2) That the Class I-A price in excess of the Midwest condensary price has been running close to the specified limit of $2.50 for the past several months, averaging $2.17 for the year 1956, and actually exceeded such limit in November and December 1956 and in January 1957.

(3) That the supply of milk in relation to fluid sales appears more than adequate for the foreseeable future. Milk for all Class I uses and for fluid cream in the marketing area accounted for 55 percent of receipts from producers for the year 1956, and for 74 percent in November, the month of lowest production.

(4) Both the Class I-A price and the uniform price in recent months have been substantially above the same months a year earlier. Such increases in the Class I-A price ranged from 31 cents in November 1956 to 56 cents in March 1957, and increases in the uniform price ranged from 23 cents in October 1956 to about 50 cents for the months of November 1956 through February 1957.

(5) The returns to producers under the amended order, due to factors other than a higher Class I-A price, are expected to be substantially higher than they otherwise would be. Proponents of a single order estimated an increase of 23 cents had the amended order been in effect for the year 1955.

It is concluded that adjustments should be made in the Class I-A price formula to prevent any substantial increase in the general level of the Class I-A price resulting solely from expansion of the marketing area.

There appear to be three possible ways of accomplishing that result: (1) suspending operation of the formula and fixing specified Class I-A prices for a period of one year or more pending availability of receipts and utilization data under the amended order, (2) adjusting the base utilization percentage to reflect what would have been the situation in 1948 had the territory now being added to the marketing area been included in the marketing area in 1948, or (3) changing the formula so that the factors used therein are based on conditions in 1955 rather than in 1948. The third alternative has the advantage of being the only one for which adequate data are contained in the record.

The simple average of Class I-A prices for 1948 was $5.66, the base price used in the formula. The simple average of Class I-A prices in 1955 was $5.20. Accordingly, the $5.66 base price used in the formula should be changed to $5.20.

For the year 1955, the weighted average of monthly percentages of pool milk in Class I (A, B, C) was 47.0 and the simple average was 48.1. The weighted average, had the order covered the expanded area, would have been 55.1, or 8.1 points higher than the actual.

[4209] The simple average of monthly Class I utilization percentages in 1948 was 63.6 and the weighted average was 61.4. The simple average for 1948 is used as the base factor in the formula. With the expanded pool yielding an increase of 8.1 points in the weighted average a similar increase would be expected in the simple average. A factor of 56.2, therefore (48.1 plus 8.1), should be substituted for the 63.6 in the formula. The utilization percentages for any of the 36 months used in the formula for months prior to the effective date of the amendment herein provided should be increased by 8.1 points.

The wholesale commodity price index as issued on a 1947-

1949 base should be converted to a 1955 base rather than to a 1948 base as at present.

The cost of production index for use in measuring the adequacy of the Class I-A price should be the index computed by the New York State College of Agriculture at Cornell University adjusted to a 1955 base. Adjustments for specified costs in Pennsylvania and Vermont should be eliminated pending further consideration at a hearing. In the meantime, the Cornell index should be satisfactory for the purpose for which it is used since it is currently 84 percent of the weight in the index currently used. New York State will continue to supply the major part of the milk in the new pool for the expanded area. The provision for using only 90 percent of the cost index in paragraph (b) (2) of the formula should be eliminated inasmuch as the reasons for that percentage are eliminated when the index is changed from a 1948 to a 1955 base.

There is no need for using the adjusted Class I-A pricing formula in computing Class I-A prices for the first two months following the effective date of amendments herein set forth since the computation of such prices will not involve the use of utilization percentages under the amended order for the expanded marketing area. Accordingly, as a means of more surely and effectively implementing the foregoing stated objective relating to change in the level of the Class I-A price, the Class I-A formula provisions in effect for the month immediately prior to the effective date of other amendments provided for herein should be used in computing Class I-A prices for the first two months following the effective date of such other amendments.

Handlers contended that the shift of basing points for mileage zones from Columbus Circle to an arc of basing points would increase the level of Class I-A prices by about 2 cents. On the other hand, a shift from country plant to city plant classification will decrease somewhat the over-all volume of Class I-A to which the Class I-A price applies. Changing transportation differentials will change Class

I-A costs for every zone except one, and in most zones by more than 2 cents. Considering the offsetting effect of these two minor factors, and the possible minor effect on the level of the Class I-A price of shifting to a 1955 base, it is concluded that no special adjustment in the price should be made to recognize the change in price resulting from the use of the arc of basing points.

As to part (b) of this issue (No. 2) as above listed, it is concluded that no provision should be made establishing for Class I-A milk distributed in the Upstate extension of the marketing area a price lower than for Class I-A milk shipped to the present marketing area.

A proposal was made by a group of "Upstate dealers" that for a period of one year the price for Class I-A milk distributed in the Upstate extension of the marketing area should be 40 cents less than for other Class I-A milk in order to reduce the impact of higher resale prices reported to be contemplated coincident with extension of the marketing area. It was not established that payment of the full Class I-A price would have any significant effect on fluid milk sales or that not having been regulated previously constitutes a sound reason for fixing a lower Class I-A price. Establishment of the proposed lower Class I-A price in the Upstate area would be inconsistent with the principle of uniform prices to all handlers for the same use, and would tend to defeat the basic purposes of the marketing area extension.

3. *Milk for fluid use outside the marketing area.* It is concluded that fluid milk sold outside of the marketing area should be classified as Class I-B and that the present Class I-C classification be eliminated.

At the present time, fluid milk sold outside the marketing area, with the exception of that sold in the State of New York and in Northern New Jersey, is classified as Class I-B and priced at the Class I-A price. Fluid milk sold in the State of New York outside of the present marketing area and in Northern New Jersey is classified

as Class I-C and priced at 20 cents per hundredweight higher than the uniform price.

Handlers contended that by extending regulation to include Northern New Jersey and Upstate New York, a substantial number of dealers who heretofore have been unregulated will be regulated and that these dealers have substantial fluid sales in bulk outside the area as well as in consumer packages on routes which extend out of the proposed marketing area in Upstate New York and along the southern marketing area boundary in Northern New Jersey. They pointed out that unless the Class I-C price is continued for fluid sales in Upstate New York outside the extended marketing area and that, unless the I-C price is established for other fluid sales outside of the extended marketing area, regulated handlers would lose these sales to unregulated dealers who would be in a position to undersell regulated handlers with the result that milk presently sold as fluid would be utilized in manufactured products. Dealers also contended that unregulated handlers could obtain additional supplies needed to take care of an increase in their fluid sales by obtaining additional producers on a year-round basis or by taking producers from pool handlers when they needed additional milk and releasing them during periods in which fluid sales decreased, and that pricing provisions of an order should not price regulated handlers out of markets that they are qualified to serve.

About 97 percent of the total Class I-C milk sold in 1955 was sold in that territory being added to the marketing area. Only about 18.4 million pounds were sold outside that territory; 7.7 million pounds in northern New York and 10.7 in western New York. Sales of Class I-C milk during the vacation months of July and August accounted for 45 and 37 percent, respectively, of these totals for the year. The amounts in northern New York varied from a low of 131 thousand pounds in the month of May to a high of 1,781,000 pounds in the month of July. In western New York, the variation was from a low of 120 thousand pounds in May to 2,051,000 pounds in the month of August.

Extension of the marketing area in Upstate New York as herein provided will result in a substantial reduction in the number of unregulated handlers and plants from which to obtain supplies of milk for fluid use outside the marketing area. Many plants supplying milk for use outside the extended area in Upstate New York also have substantial sales within the area and would be regulated. Also, unregulated handlers in the territory outside the marketing area in Upstate New York presently have a high percentage of their milk in fluid use, and consequently, would not be in a position to increase their fluid sales particularly during periods of highest Class I-C sales, without increasing their receipts from farmers. There appears to be little incentive for the abandonment of sales within the marketing area (thus avoiding regulation) in order to be in a position to supply unregulated milk in relatively small volumes to the widely scattered outlets in northern and western New York. Any plant operator, however, will have the choice of operating either in a manner so that he will not be regulated.

Extending the marketing area to include Northern New Jersey will regulate dealers not previously regulated who have some fluid bulk and consumer packaged route sales extending into southern New Jersey from plants inside the marketing area. To a considerable extent, this competition outside the marketing area in southern New Jersey will be with handlers with plants located in southern New Jersey but from which milk also is distributed within the marketing area, and consequently, will also be regulated. In addition, the milk supplies of other dealers in southern New Jersey with whom regulated handlers may be in competition will be subject to regulation either by the New Jersey Office of Milk Industry or under the Philadelphia order (No. 61).

Many presently unregulated out-of-State sources of supply for southern New Jersey also have substantial outlets in Northern New Jersey, and thus will become regulated upon extension of the marketing area. The number

of unregulated sources of milk for southern [4210] New Jersey will be substantially smaller than at present.

The pricing of milk for fluid use outside the marketing area has been a major problem since issuance of Order No. 27 in 1938. The centers of population in which substantially all of the Class I-C milk now is sold have relied for a long period of time for a substantial part of their fluid milk requirements upon sources of supply in the same production area as those upon which the defined marketing area depends for its supply of fluid milk. Upon issuance of the order in 1938, many of these common sources of supply became subject to regulation under the order. Instead of including such other consuming centers (principally Northern New Jersey and Upstate New York) in the defined marketing area under the order as originally promulgated, special pricing provisions were adopted recognizing the historical dependence both of such excluded areas and the defined marketing area upon a common source of supply. Such special pricing provisions were in recognition of the absence of effective regulation applicable to the entire supply of milk for all areas in which sales were made by regulated handlers and to avoid disruption of long established patterns and practices of handling and distribution involving substantial volumes of milk.

When the order first became effective, milk for fluid use in such territory outside the marketing area was excluded from the pricing provisions of the order. This practice was soon found to be unsatisfactory, and since July 1, 1947 milk for such out-of-area fluid use has been classified as Class I-C and priced at the uniform price, plus 20 cents.

Thus, provisions of the order as originally promulgated deviated from the usual pattern and basic policy otherwise applied in pricing milk for fluid use in markets under Federal regulation. There is no other Federal order containing provisions comparable to the Class I-C pricing provision under Order No. 27. Elsewhere, milk disposed of for fluid use both inside and outside the marketing area is regarded as a primary use and priced to bear its full

share of the extra production and marketing costs associated with assuring an adequate and dependable supply of milk for fluid use. This pricing policy was not followed in the New York market because of the conditions and circumstances cited.

However, expansion of the marketing area to include Northern New Jersey and Upstate New York as herein provided eliminates the basic reasons for Class I-C pricing in the first instance, and removes any acceptable basis for continuation of a provision under which milk for fluid use outside the marketing area is priced lower than for fluid use in the marketing area. Special pricing provisions are no longer justified for the relatively small and highly irregular volume of milk which may be sold outside the expanded marketing area.

A proposal was made that milk disposed of for fluid use outside the marketing area (other than in packaged form on routes from regulated plants) during the months of July through December be accounted for at the Class I-A price, plus 10 percent. This proposal was designed either to exclude from the pool sources of milk for fluid use outside the marketing area or to provide for compensating the pool for carrying the reserve supply associated with such out-of-area sales. Such a provision would be inconsistent with the established practice of establishing the same price for milk for fluid use both within and outside the marketing area and could result in milk being used in Class III which otherwise would be sold for fluid use outside the marketing area at the full Class I-A price. The need for such a provision was not established as a means of accomplishing the purpose for which it was proposed particularly in view of the amendments herein provided relating to the designation and cancellation of pool plants under the order for the expanded marketing area. Adoption of this proposed provision should be deferred at least until the extent of and manner in which pool milk is utilized for fluid use outside the marketing area can be ascertained and analyzed.

SECRETARY'S AMENDATORY DECISION IN 1957

4. *Fluid cream.* Producer proponents of a single order proposed that milk used for fluid cream and disposed of in the present marketing area be classified as Class II-A and continue to be priced at the Class II level and that milk used for fluid cream and disposed of in the areas proposed for regulation in Upstate New York and in Northern New Jersey be classified as Class II-B and priced at the present Class III level.

Dealers proposed that the Class II classification in Order No. 27 be eliminated and that milk used for fluid cream and disposed of in all portions of the area under regulation, including the present marketing area, be classified as Class III and be priced at the present Class III level.

Northern New Jersey is an "open cream market" with applicable health regulations not requiring cream to be obtained only from those sources approved as sources of milk for fluid use. Accordingly, cream for fluid use in Northern New Jersey will be available from unregulated sources at open market prices. Prices established by the New Jersey Office of Milk Industry for milk used for fluid cream are similar to the Class III price under Order No. 27.

Regulations of the Department of Health of the State of New York require that cream for fluid use be obtained only from sources approved as sources of fluid milk. It was proposed, however, that milk used for fluid cream in the Upstate area be classified in Class III on the basis that (1) the price presently established (Class II) for milk for fluid cream is too high even in the present marketing area, (2) milk used for fluid cream in the Upstate area is presently priced at the Class III level, and (3) that a substantial increase in the price of fluid cream in the Upstate territory probably would result in a substantial reduction in fluid cream sales.

For the year 1955, the Class II price averaged 82.5 cents higher than the Class III price, and it was estimated that increasing the price of milk used for fluid cream from the Class III to the Class II level would result in an increase

in the price to consumers of 6 cents per half pint of heavy cream.

In 1955, the volume of milk used for fluid cream in Upstate New York amounted to 175 million pounds and 230 million pounds in Northern New Jersey. This is an important outlet not only for milk presently regulated under the order but also for milk of handlers which are presently unregulated, but to most of whom regulation for the expanded area will apply.

The proposed reduction from the Class II to the Class III level in the price of milk used for fluid cream in the present marketing area was on the basis that (1) the Class II price for fluid cream is too high in relation to the prices established for milk used for fluid cream in other nearby Federally regulated markets, (2) the volume of pool milk used for fluid cream in the marketing area had declined substantially during the period since the order became effective, and (3) the present Class II price encourages consumers to purchase available substitutes.

There is no basis for determining to what extent, if any, the sale of fluid cream in the present marketing area would increase as a result of reducing to the Class III level the price of milk used for that purpose. Consequently, it is impossible to determine whether the increased volume would be sufficient to offset the reduction in returns to producers resulting from a reduction in the price. The per capita consumption of fluid cream in the present marketing area is higher than in most other nearby markets.

It is concluded that, at least for the present, milk used for fluid cream (and other uses presently in Class II) disposed of outside the present marketing area should be priced at the Class III level and that milk used for fluid cream disposed of in the present marketing area should continue to be priced at the Class II level. The establishment of a new classification (Class II-B) as proposed to give identity to milk used for fluid cream outside the present marketing area, as distinguished from other Class III uses, is not necessary since volumes of milk used for

fluid cream outside the marketing area will continue as at present to be appropriately identified in the statistical data published by the market administrator.

5. *Class III classification and pricing.* It is concluded that there should be no special price for milk in Class III for local uses at pasteurizing and bottling plants in the Upstate extension of the marketing area.

Upstate dealers proposed that the Class III price at Upstate pasteurizing and bottling plants be 20 cents lower than the price applicable at other plants on the basis that their facilities for handling surplus milk are limited and that their costs of manufacturing would be higher than for larger volume specialized manufacturing plants.

The Class III price under the order is a price designed to provide the maximum return to producers and at the same time result in complete utilization of all milk in excess of fluid requirements. It was [4211] not shown that the attainment of these objectives required a reduction of 20 cents in the price of Class III milk at pasteurizing and bottling plants in the Upstate territory. Since all Class III milk is being adequately handled, no sound purpose would be served by a shift of milk from plants where it currently is manufactured to other plants, particularly when such a shift involves a reduction in handling efficiency and in returns to producers.

The order presently provides, subject to specified conditions, for classification in Class III during the months of March through July of milk delivered in bulk to an establishment (other than a plant) outside the marketing area at which food products are processed and packed in hermetically sealed containers. Under present provisions, milk so utilized during the months of August through February would be in Class I-C. With the marketing area extended, however, to include Upstate New York territory and Northern New Jersey and with the elimination of Class I-C pricing, all milk so utilized would be in Class I-A since the food processing establishments referred to are located in the Upstate extension of the marketing area. Evidence pre-

sented indicates the desirability of continuing the classification of such milk in Class III. This should be accomplished by amending § 927.37 (e) (4) of the order by eliminating reference to "outside the marketing area" the months of March through July, thus providing for classification of such milk in Class III during all months.

Dealer representatives proposed that milk lost in transit for any reason or destroyed at a plant by fire, flood, riots or similar casualty should be classified and priced as Class III upon proof of such loss to the satisfaction of the market administrator. They pointed out that such losses of milk resulted in producers being paid the Class I-A price for milk which was not utilized as fluid and for which the handler receives no remuneration.

Producers should not be expected to assume the risks involved in milk handling after the milk has been delivered by producers to the handler's plant. Since insurance relating to such losses is available to handlers, it is unnecessary to provide for the proposed lower price to producers.

It was proposed at the hearing that milk used in the manufacture of roller processed nonfat dry milk be priced separately from milk used in the manufacture of spray process nonfat dry milk. Proponents contended, (1) the Commodity Credit Corporation treats roller powder and spray powder as two different commodities and supports spray at higher prices than roller, (2) the support price generally sets the market prices for these supported products in a free market, and (3) continuation of the same pricing for milk used in both processes will force regulated handlers to install spray equipment and become large manufacturing handlers.

Dairy product prices and yield factors employed in the Class III formula are designed primarily to reflect changes in the market value of products made from Class III milk, and purport to constitute only an approximation of the actual returns to handlers from the sale of products made from Class III milk. Since actual product yields and product prices obtained by handlers may be either higher or

lower than the yield factors and product prices used in the formula, it follows that only by coincidence is the handler's operating margin between the amount received for products and the producer price for Class III milk equal to the handling and manufacturing allowance specified in the formula. Proposals to use only market prices for roller process nonfat dry milk solids in pricing Class III milk from which the skim milk is used to make that particular product run counter to the concept of pricing here employed. Product prices are used in the formula to reflect changes in the general market value of milk for a variety of uses, with the choice of uses being exercised by those handling the milk. It is neither economically sound or administratively feasible to attempt to establish a separate minimum producer price for milk used in each one of the considerable number of products for which Class III milk may be utilized.

It is concluded that no change should be made in the nonfat portion of the formula for the pricing of Class III milk and that milk used in the manufacture of spray and roller nonfat dry milk should continue to be priced as at present.

The order presently requires the addition of three cents to the average butter price used in computing the Class III price for the months of August through February whenever the utilization adjustment percentage used in computation of the Class I-A price is 92 or higher. The figure 92 is no longer appropriate because of the increase in fluid utilization under the order associated with expansion of the marketing area and because of the change from 1948 to 1955 in the base period used in computation of the Class I-A price. Due to these other changes the utilization adjustment figure of 107.5 is comparable with the present figure of 92 and, accordingly, should be substituted therefor.

6. *Fluid skim differential.* The fluid skim differential provisions should be applied in the expanded marketing area to the same products and at the same rate as presently applicable in the marketing area.

The producer proponents of the single order proposed such extension. The proponents of a separate order for

New Jersey proposed that the products covered by the fluid skim differential be classified as Class I. Dealers proposed that the provisions be eliminated from the order.

The products covered by the fluid skim differential are essentially fluid milk products having generally a butterfat content about the same as or less than whole milk. (Half and half, which is essentially the product which would result from the mixture of equal parts of whole milk and light cream is an exception, but the differential applies to only part of the skim milk in this product.) The application of the fluid skim differential is a method of attaching a fluid milk price to the skim milk used in these products. The reasons for expanding the marketing area to obtain a Class I-A price for all of the fluid milk in such marketing area are equally valid for supporting the application of the fluid skim differential to the products covered thereby throughout such marketing area.

The principal objections advanced by dealers to the fluid differential were as follows:

(1) New Jersey dealers may reconstitute fluid skim milk from nonfat dry milk and water. Such a product, however, must be labeled "reconstituted". There was no evidence either as to the extent of such reconstitution or the consumer acceptance of such a product.

(2) There has been a great increase in the sale of packaged nonfat dry milk to consumers. There was no evidence, however, that such sales have displaced sales of fluid skim milk either in the present or expanded marketing area. Loss of such sales will not reduce the return to producers below the level which dealers propose to return to producers for such sales.

(3) If the present Class II price were eliminated as proposed by the dealers, and the differential were based on the difference between the present Class III price and the Class I-A price, the differential would be too high. Since the present Class II price is not being eliminated, the increased rate objected to will not be applicable.

*7. Location differentials and mileage zones.* The order should be amended to provide for the following location differentials:

(1) Differentials which are applicable to class prices and which are paid by handlers on Class I-A, Class I-B, and fluid skim milk should be graduated on a basis of 1.4 cents per ten-mile zone throughout the milkshed. Differentials applicable to other classes should not be changed,

(2) The transportation differentials applied in making payments to producers at the uniform price should be the same as for Class I-A milk,

(3) Provisions for special differentials to be paid out of the pool in connection with payments to nearby producers should be modified so that such differentials are paid by mileage zones on the basis of the location of farms. The rate of such differentials should vary by zones and with the percentage of pool milk utilized in Classes I-A and I-B (on an annual basis). When such utilization is between 55 and 60 percent, the rates should range from 40 cents in the 1-50 mile zone to 5 cents in the 111-120 mile zone. The rates should decline with higher fluid utilization and be completely eliminated when fluid utilization exceeds 80 percent. Likewise, the rates should increase with lower utilization and range from 64 cents in the 1-50 mile zone to 8 cents in the 111-120 mile zone when utilization is below 45 percent. The rate also should decline if the production of milk subject to the differential increases in relation to total Class I sales,

(4) Direct delivery differentials should be paid by handlers based on the location of plants by mileage zones in relation to [4212] metropolitan New York-Northern New Jersey, and at certain locations in Upstate New York. Such differential related to the metropolitan district should be 25 cents per hundredweight in the 1 to 10 mile zone, and should decline 5 cents for each 20 miles thereafter until they are eliminated in the 71-80 mile zone.

Several proposals were made for differentials related to the location of the farm where the milk is produced; the

geographical location of the plant to which the milk is delivered; the operations carried on at the plant where the milk is delivered, and the method of delivery by producers.

Order No. 27 now provides for a special location differential which is paid to producers delivering to plants located in counties in or near the present marketing area. The major part of the differential of 30 cents per hundredweight for deliveries to plants in the marketing area and 20 cents per hundredweight for deliveries to plants in the counties outside the marketing area is paid out of the pool. An additional five-cent differential is paid by handlers. There is a variation of this general provision with respect to farmers delivering milk by bulk tank under which the differential is based on the location of the farm or the history of the farm as well as on the location of the plant to which the milk is delivered.

The principal location factor influencing the economics of pricing milk in the New York-New Jersey milkshed is location of the farm or the location of the plant to which milk is delivered in relation to metropolitan New York-Northern New Jersey. In order to obtain sufficient milk to supply the needs of this metropolitan area, milk must be obtained from as far as 400 miles from the area. It is this necessity of reaching such long distances to obtain supplies that provides the chief price differential factor for milk produced throughout the milkshed whether consumed in the metropolitan area or elsewhere. Urban and rural areas throughout the milkshed obtain their supplies from the same general sources as the metropolitan area. Demand for milk for local use in the milkshed does not materially change the price of milk in local markets in relation to other parts of the milkshed because such markets usually require a small percentage of the milk produced in the vicinity. The supplying of local markets, however, forces the metropolitan area to reach farther for its needs, and thus effects the price level of the milkshed as a whole. Location differentials, therefore, must be based primarily upon the location

of farms and plants in relation to the metropolitan New York-New Jersey area.

The center of population of metropolitan New York-New Jersey is within the boundaries of New York City. Thus, the focal point for the location of plants and producers should be within New York City. Under the present order, distances are determined from Columbus Circle.

Producer proponents of a single order proposed that distance be measured from an arc of basing points approximately 15 miles from New York City. The Milk Dealers Association of Metropolitan New York, Inc., recommended that distances be measured from a single point in New York City. Proponents of a separate order for Northern New Jersey recommended that the basing point under that order be at Newark, a city in the metropolitan area, but approximately 13 miles from Columbus Circle.

The focal point of the proposed arc of basing points is located approximately at Columbus Circle. The milkshed is so situated that any milk transported from the milkshed to the center of population would have to pass through or near one of the basing points on the proposed arc. The relationship between various plants in the milkshed, therefore, would be approximately the same whether the distance is measured from the focal point in New York City or from the arc of basing points outside of the City.

The proposed arc would have certain advantages. It would point up the fact that it is the relationship of location to the metropolitan area as a whole rather than to a specific point in the metropolitan area that is important. Milk produced and delivered to plants in the State of New Jersey would be zoned on the basis of distance to a New Jersey basing point. Plants in Westchester County, previously included arbitrarily in the 1-10 mile zone, would continue to to be in a nearer zone.

The major objection of the dealers to the arc of basing points is their contention that its use would increase the price of Class I-A milk. Since any effect of the change in

basing points on the Class I-A price or other class prices, would be relatively uniform throughout the milkshed, it is a factor to be considered in determining the level of class prices rather than in connection with the method used in zoning plants and producers.

Dealers also requested that the method of measuring mileage be revised to give recognition to those routes which milk trucks use rather than recognizing only routes with the shortest highway mileage. They contend that use of larger trucks requires use of better roads, and that many of the highways now used for purposes of zoning under the order are impractical. The use of better highways and larger trucks results in bringing distant areas economically closer to the market. However, the fact that an improved highway is available for more efficient hauling of milk by tank truck, but which results in a longer haul from plant to market than would be the case in the absence of such improved highway, does not justify a conclusion that the plant using such route should be considered farther from market than it would in the absence of such improved highway. Distance is only one of the factors affecting hauling rates. The use of mileage zones is designed to establish general relationships between prices to be paid at plants in the milkshed, and is not designed to establish truck routes to be used in transporting milk or to precisely equate the cost of milk to handlers throughout the milkshed.

It is therefore concluded that (1) The arc of basing points should be used in determing the location of country plants, (2) The method of determining highway mileage should continue as provided in Order 27, and that (3) Because of the decline in the transportation of milk by rail, and because of the use of the arc of basing points, the alternative method of determining distance by railroad mileage to New York City terminals should be eliminated.

Location differentials will be discussed herein under three headings as follows:

1. *Transportation differentials.* Differentials applicable both to class prices paid by handlers and to uniform prices

received by producers which are designed primarily to recognize the differing values because of the cost of transporting milk and milk products from country plants to metropolitan New York-New Jersey.

2. *Nearby differentials.* Differentials paid out of the pool, applicable to the uniform price to producers located relatively near the metropolitan New York-New Jersey area, and which reflect factors other than the cost transportation.

3. *Direct delivery differentials.* Differentials paid by handlers directly to producers delivering milk to specified locations reflecting factors other than those associated with varying transportation costs.

*Transportation differentials.* The most important factor affecting the value of milk at different locations in the New York-New Jersey milkshed is the difference in the cost of hauling milk, or its products, to the New York-New Jersey metropolitan area from the plant where it is received from farmers.

When Order No. 27 was promulgated in 1938, the differences in the value of milk for fluid purposes and differences in the uniform price were based on differences in railroad tank car rates from plants to New York City terminals. At that time, the tank car rate was 31 cents per hundredweight from a plant in the 201-210 mile zone. The differential for the 1-10 mile zone was 15 cents more than that for the 201-210 mile zone. This indicates that the fixed charge for transportation was 16 cents per hundredweight and the variable charge was approximately ¾ of a cent per 10-mile zone. No change since promulgation of the order has been made in the differentials applicable to the uniform price or the Class I-A price.

Tank trucks have become the most important means of hauling milk from country plants to metropolitan New York-New Jersey. Rates for hauling milk from the 201-210 mile zone to New York City by tank truck vary but average approximately 38 cents per hundredweight. This represents a fixed cost for hauling of 10 cents per hundredweight and a variable cost of 1.4 cents per ten miles.

Differentials to reflect the expected differences in value of fluid milk (Classes I-A and I-B) because of transportation costs to the metropolitan area should be set so that class prices vary by 1.4 cents for each 10-mile zone. Using the 201-210 mile zone as the base zone, differentials should increase the base prices by 1.4 cents for each zone between the 201-210 mile zone and the 1-10 mile zone. Likewise, the differentials for zones beyond the 201-210 mile zone [4213] should decrease the prices by 1.4 cents for each ten miles from the base zone.

It was proposed in the hearing that the differential applicable to Class I prices be tapered off so that such prices beyond the 250-mile zone would be reduced less rapidly than at the rate of 1.4 cents per zone. The reason given for such tapering was that sufficient milk is produced within 250 miles of metropolitan New York-New Jersey to meet the requirements for fluid milk. This is true at present but a considerable amount of more distant milk has been required in the short production months of earlier years when supplies were less abundant relative to fluid sales. Furthermore, the practice in the milkshed, even with the present tilt in favor of nearby milk, has been to obtain milk for fluid use from all zones. In November of 1956, about 20 percent of milk for fluid use was received at plants beyond the 250-mile zone. In the interest of uniformity among handlers and sources, the differential rate of 1.4 cents per 10-mile zone should apply throughout the milkshed.

The most distant plant in the milkshed approved either for the marketing area or for Northern New Jersey is presently between the 401-425 mile zone (and two zones near under revised zoning); the differentials do not need to be carried beyond this point. Therefore, the table of differentials should be so limited that the last zone is 401 and over, rather than 491 and over as at present.

There were three proposals with respect to transportation differentials applicable to Class II and Class III milk. The proponents of the single order proposed that such differentials be adjusted upward in areas relatively close to

metropolitan New York-New Jersey to discourage the use of nearby milk for Class II and Class III purposes. A handler with a manufacturing plant located relatively near the metropolitan district proposed that differentials on Class II and Class III milk be reduced so that the cost of Class II and Class III milk in the nearby zones would be approximately the same as in distant zones. It was contended that nearby plants could not handle Class II and III milk in competition with distant plants. Proponents of separate orders proposed a reduction in the differentials on Class II and Class III milk to more accurately reflect differences by zones in the cost of transporting products made from such milk. When a greater spread in Class I prices based on distance is being established, the use of nearby milk for Class II and III purposes should not at the same time be encouraged by decreasing the differentials applicable to milk in those classes. However, the justification for increasing such differentials in the nearby zones, thus increasing the price of Class II and Class III milk to handlers operating plants relatively close to the metropolitan district, was not established. Such differentials should remain unchanged.

The order presently provides for transportation differentials applicable to the uniform price which are the same as those applicable to the Class I-A price. The proponents of the single order for the entire area and the separate order for Northern New Jersey both proposed that the uniform price differential be the same as the Class I-A differential, except that the proponents of the single order proposed that minus differentials for zones beyond the 201-210 mile zone be midway between those currently in effect and the full minus differentials resulting from the use of 1.4 cents per zone. Others proposed that the present schedule of transportation differentials not be changed. Differences in the uniform price by zones are properly related to the cost of transporting fluid milk rather than some manufactured dairy product. A producer who wished to deliver to a plant in the metropolitan area or nearer than the plant in his vicinity would be required to pay for hauling whole milk.

The prices to producers sharing in returns from fluid sales should reflect differences in its value for that purpose depending upon location. Accordingly, the 1.4 cent differential rate per zone should apply to the uniform price throughout the milkshed.

*Nearby differentials.* Order No. 27 has always provided for special location differentials applicable to milk in the counties relatively near the metropolitan area. These differentials traditionally have applied to milk delivered to plants in such areas, but with the coming of bulk farm tank delivery, the location differentials with respect to that type of delivery have been based on location of the farm and the history of the farm in relation to such differentials as well as on the location of the plan to which the milk was delivered. The latter method of application was designed as a temporary measure to handle an emergency problem which arose under the original location differential provisions.

Special location differentials (except for bulk tank delivery) have been paid on the basis that the location of the plant also indicates with sufficient accuracy the location of the farms serving such plant. Because of the increasing length of haul from farm to plant due primarily, but not entirely, to the development of bulk farm tank pickup, the proponents of a single order for New York-New Jersey proposed that nearby location differentials be applied on the basis of the location of the farm from which milk is delivered rather than on the basis of the location of the plant to which such milk is delivered.

Several factors and considerations have been advanced in support of nearby location differentials among which are (1) increased cost of production in the area, (2) they have been paid historically, (3) the inherent value of nearby milk to the market because of its availability and the high quality of such milk, (4) the more intimate relation between producer and dealer, (5) they compensate nearby producers for a relatively more even seasonal production, and (6) they compensate the nearby producers for the reduction in his share of the fluid market resulting from participation in a marketwide pool.

Cost of production is a criterion for establishing prices under an order only to the extent that it affects the supply of milk for the market. Orders do not guarantee a price equal to or exceeding the cost of production, and therefore, producers generally should not be required to pay a minority an increased return because of high production costs. Accordingly, it is concluded that factor (1) above does not provide a legitimate basis for nearby location differentials. A history of paying nearby location differentials (factor (2) above) has merit only if the historical basis for such differentials is found to be sound, and therefore, must be considered in the light of other factors.

Factors (3) and (4) above, to the extent that they are valid, are related to the extra value of such milk to the handler who buys it rather than to producers generally and are, therefore, appropriate for consideration in connection with direct delivery differentials payable by handlers rather than out of the pool.

Factors (5) and (6) of those listed above are the only ones representing values for which compensation appropriately may be derived from the pool rather than directly from the handler receiving the milk.

The seasonal pattern of milk production in the nearby area is more uniform throughout the year than for the milkshed as a whole, and thus is a possible basis for location differentials payable out of the pool. However, because of the existence of considerable variation in the seasonal pattern of production among individual producers in all sections of the milkshed, it was proposed that a base rating plan be adopted as a more equitable plan of apportioning returns to producers to compensate for uniform seasonal production.

Historically, the percentage of the milk produced nearest to metropolitan New York-New Jersey which is used for fluid purposes is higher than the percentage of more distant production which is used in fluid form. Over 92 percent of the milk received in 1956 at pool plants within 125 miles was for fluid use. Nearby producers have been able to get a price higher in relation to more distant producers

than can be accounted for by the advantage in the cost of transportation to market. When milk is pooled on a marketwide basis, the nearby producer is paid on the basis of the average utilization of all milk in the milkshed rather than according to the utilization of his milk. Together with equalization, however, he obtains the benefit of an established Class I price which may be higher than in the absence of regulation, and is protected to some extent from the loss of a market because of competition of cheap milk from more distant sources. The distant producer also benefits from an established Class I price, and in addition gains a larger share of the fluid market than is likely without equalization.

In order to provide benefits of more nearly equal value both to nearby and distant producers, some form of special location differential is needed, the effect of which is to give the nearby producer a somewhat greater share of the high-priced Class I-A milk than he would obtain through marketwide pooling without [4214] such a differential, but a smaller share than he would be expected to obtain under an order with handler pools.

The share of the fluid market that the nearby producer gives up through marketwide pooling depends not only on how his milk is actually used, but also upon the fluid utilization of all milk in the pool. If fluid milk utilization in the marketwide pool is high, the neaby producer is giving up little through marketwide pooling. If, on the other hand, the fluid utilization is low, the nearby producer is contributing a considerable amount of the fluid market for the benefit of the entire pool. Accordingly, location differentials constituting an equalization adjustment payable to nearby producers should be at rates varying inversely with the percentage of Class I milk in the pool.

Producer organizations constituting the major proponents of a single order proposed a schedule of nearby differentials varying by zones and by utilization percentages as follows:

| Mileage zone of the farm | Percentage utilization in Classes I-A and I-B | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Under 45 | 45 and over, but under 50 | 50 and over, but under 55 | 55 and over, but under 60 | 60 and over, but under 65 | 65 and over, but under 70 | 70 and over, but under 75 | 75 and over, but under 80 | 80 and over |
| | Dollars per hundredweight | | | | | | | | |
| 1-50 | 0.64 | 0.56 | 0.48 | 0.40 | 0.32 | 0.24 | 0.16 | 0.08 | 0 |
| 51-60 | .56 | .49 | .42 | .35 | .28 | .21 | .14 | .07 | 0 |
| 61-70 | .48 | .42 | .36 | .30 | .24 | .18 | .12 | .06 | 0 |
| 71-80 | .40 | .35 | .30 | .25 | .20 | .15 | .10 | .05 | 0 |
| 81-90 | .32 | .28 | .24 | .20 | .16 | .12 | .08 | .04 | 0 |
| 91-100 | .24 | .21 | .18 | .15 | .12 | .09 | .06 | .03 | 0 |
| 101-110 | .16 | .14 | .12 | .10 | .08 | .06 | .04 | .02 | 0 |
| 111-120 | .08 | .07 | .06 | .05 | .04 | .03 | .02 | .01 | 0 |

The above rates appear reasonable and adequate for the purpose indicated. Other producer representatives proposed either that location differential provisions not be changed or that they be eliminated entirely. If the nearby location differential rates currently in effect under Order No. 27, which are substantially the same as those established in 1938, accurately reflected the proper apportioning of the pool to nearby and distant producers in 1938, the rates now proposed appear reasonable in view of increased level of prices. The rates are tapered off by mileage zones for the purpose of providing a gradual and orderly reduction from the rates applicable to milk from farms located nearest the metropolitan area to those applicable to milk from farms located in the 111-120 mile zone, beyond which no location differentials are applicable.

Two proponents of a separate order for Northern New Jersey proposed relatively high location differentials applicable to that area. Because the volume of nearby milk would be a relatively large proportion of total pool milk under the proposed separate order for Northern New Jersey, such differential would have resulted in a substantial decrease in the returns otherwise received by distant producers and in a relatively small net increase in returns to producers near the market. Under a single order, however, the volume of nearby milk will be a considerably smaller proportion of total pool milk. Consequently, location differentials may be provided under a single order which substantially increase returns to nearby producers without reducing the uniform price significantly. Specific rates of location differentials under the separate order, therefore, are not comparable in effect with the same rates under a single order.

In order to minimize the administrative problems involved in determining zones for individual farms, zones for each township or other minor civil division should be determined by the market administrator by the same method generally as that prescribed in determining zones for plants, with the zone for each farm considered to be in the same

zone as the township in which the farm milkhouse is located.

A straight line differential based on distance alone would provide location differentials for some producers who previously delivered milk to a plant at which location differentials were not applicable and at the same time would reduce or eliminate payments to producers who have traditionally received such payments. Farms in the latter category are located in the Hudson and Harlem Valleys and deliver milk to plants in Columbia County and the eastern half of Greene County, or to the present marketing area. Distance alone does not account for the traditional payment of location differentials since it does not take into account such factors as the development of urban population in the Hudson and Harlem Valleys and the historical association of certain production areas with the metropolitan market.

A straight line mileage differential, therefore, should be modified in the Hudson Valley by extending the differentials further than would result from a strict adherence to the proposed table based on distance. The rates for farms located in Columbia County; the eastern half of Greene County; Albany County; and Rensselaer County should be as follows: for farms in the 91-120 mile zone, the rate for the 91-100 mile zone; for farms in the 121-130 mile zone, the rate for the 101-110 mile zone; and for farms in the 131-140 mile zone, the rate for the 111-120 mile zone.

Application of straight line mileage to farms located in New Jersey would fail to recognize that farms located in New Jersey outside the marketing area are as favorably located marketwide as farms located within the marketing area and within the 1-50 mile zone. Farms located in New Jersey, therefore, should all be considered to be in the 1-50 mile zone for nearby differential purposes.

Nearby differential rates applicable each month should be related to the average of the percentages of pool milk classified in I-A and I-B for the 12 months immediately preceding. This figure will be known and can be announced by the market administrator in sufficient time to be used by han-

dlers in reporting their net pool obligations for the month. Basing the differential rate on such a 12-month average will avoid month-to-month changes and substantial seasonal variation in the rates which otherwise would occur and which were not shown to be desirable.

Actual utilization percentages under the amended order for a 12-month period will not be available, however, for the first 12 months after it becomes effective. During this period the differential rates should be those applicable when utilization is between 55 and 60 percent. This appears to be a reasonable and realistic estimate of actual utilization in view of the estimated percentage of 55.1 for the year 1955 and the trend in recent months toward higher utilization under the present order.

If nearby producers increase their production in relation to the volume of Class I-A milk in the pool, they will be contributing to a lower percentage of fluid utilization for the pool as a whole. In order that they may not become eligible for higher differentials solely because of their own increased production, provision should be made for an automatic reduction in the rates in the event that the volume of milk subject to the nearby differential increases in relation to total Class I-A milk in the pool. The determination as to whether production of milk to which the nearby differential applies has increased in relation to total Class I-A sales should be made, for the first time following the thirteenth month (and in similar fashion each month thereafter) for which the amended order for the expanded area is in effect, by calculating the difference between the ratios of (1) production of nearby milk to Class I-A sales in the first 12 months, and (2) production of nearby milk to Class I-A sales in the most recent 12-month period. Then the nearby differential rates should be reduced 10 percent for each point by which the latter ratio exceeds the former.

Nearby differentials of this type are designed to reflect the fact that under competitive conditions milk produced in this area has a traditional outlet as fluid milk at plants located in the nearby area, and therefore, should be paid only

on milk so delivered. Producers choosing to deliver milk to a plant further from the metropolitan area and outside the 111-120 mile zone should not be eligible for this differential.

*Direct delivery differentials.* Proponents of a single order and separate orders both proposed that handlers pay an additional differential known as "direct delivery differentials." The only differential currently contained in the order that is comparable with the proposed direct delivery differential is that part (5 cents) of the location differentials [4215] paid by the handler receiving the milk.

The proponents of a single order proposed that direct delivery differentials be applicable as follows:

(1) 25 cents per hundredweight on all milk delivered in cans, and 35 cents per hundredweight on all milk delivered by bulk tank directly from farms to plants in counties in or near the area covered by the 1-30 mile zone.

(2) Continuation of the 5 cents paid by handlers under the present location differential provisions, and 15 cents per hundredweight on all other milk delivered to pasteurizing and bottling plants in the proposed marketing area and used for Class I-A milk distributed locally, except that where the plant is subject to the 5-cent payment, the 15-cent rate would be reduced to 10 cents.

Proponents of a separate order proposed direct delivery differentials of 30 cents per hundredweight for the 0-50 mile zone with reductions to zero beyond the 91-100 mile zone. Another proposal was for payment of a direct delivery differential at rates ranging from 10 to 40 cents depending upon whether receipt of the milk is in cans or in bulk tank, and upon the "type of market" in which the plant is located and in which Class I sales are made. Under this proposal, the differential paid by the handler for direct delivered milk would be financed in part by an assessment on all handlers per hundredweight of Class I sales.

Among the reasons given in support of these proposals were the following: (1) such milk is worth more to dealers; (2) producers incur added costs in delivering directly to pasteurizing and bottling plants; (3) provides for better

equalizing of dealer's product cost, particularly in the metropolitan area where the major part of the supply is received from country plants rather than by direct delivery; (4) reflects existing practice; (5) needed to guarantee an adequate supply of milk at city bottling plants; (6) to encourage the shift from country receiving milk to the more efficient direct shipment from farms to city plants; and (7) to insure that the potential savings in more efficient handling of milk be returned to producers.

These proposals for a direct delivery differential were opposed on various grounds including (1) that the premiums historically paid at pasteurizing and bottling plants vary widely between areas; (2) that such premiums do not constitute appropriate criteria for establishing a direct delivery differential; (3) that producer costs of delivery to the pasteurizing and bottling plants are no greater in many instances than delivery to other plants; (4) that direct delivered milk may or may not be worth more to the dealer depending upon the location of his plant and other factors; (5) that a requirement that such differential be paid would result in inequity and dissatisfaction among the producers, uneconomic shifting of producers and the unwarranted payment of premiums at other pool plants; and (6) that no basis was established for a provision in the order designed to encourage a shift from delivery to country plants to the alleged efficient method of direct delivery to city pasteurizing and bottling plants.

In most instances the value to a handler of direct delivered milk is related to the lowest cost of an alternative supply which meets his requirements with respect to volume, seasonality and quality. Where abundant supplies are available from a relatively large number of producers delivering to nearby pool plants and who are being paid the minimum Order No. 27 uniform price, only a small premium, if any, is required to obtain an adequate supply of direct delivered milk. If the best alternative is direct receipts from producers in a more distant area, direct delivery from nearby producers is worth the price which

must be paid in the more distant territory plus the additional cost of transporting milk from that distant territory. If the best alternative supply is milk from an Order No. 27 pool plant, direct delivery is worth the class price at that plant plus the charge for country plant handling and hauling.

Likewise, a producer may be expected to deliver to a pasteurizing and bottling plant if he considers that to be a market which will pay him more than his best alternative outlet. If that outlet is an Order No. 27 country plant paying the minimum uniform price, it will not require much more than the uniform price to persuade him to deliver to the pasteurizing plant. If, on the other hand, his best alternative outlet is a distributor from an adjacent market, or a local dealer paying a premium, the pasteurizing and bottling plant will need to meet the premium in order to obtain the milk.

Exceptions were taken to direct delivery differentials based on the contention that they are not "location differentials" as that term is used in the act. They are called "location differentials" herein and so they are; but they are also customary market differentials based upon the location of the plants to which producers deliver milk.

Direct delivery differentials will be discussed herein in two parts, (1) those associated with plants located in or near metropolitan New York-New Jersey where alternative supplies mainly are from country plants, and (2) those associated with Upstate New York where alternative supplies are primarily other producers delivering to country plants.

(1) *Delivery to the metropolitan New York-New Jersey and nearby territory.* Metropolitan New York-New Jersey receives the major part of its milk supply from country plants; only a small part of the total is received from producers delivering milk directly to processing plants in or near this territory. Milk dealers receiving milk from country plants for distribution in the metropolitan territory therefore must pay, in addition to the price paid farmers,

an additional charge covering the cost of handling at the country plant and the cost of transportation, including both the fixed and variable costs of transportation from country plant to city plant.

Some handlers process milk for consumer distribution from plants located in the rural territory immediately surrounding the metropolitan area at which plants milk is received directly from producers. In this case, the handler may avoid the extra cost of operating two plants but this saving may be offset to some extent by the cost of transportation of processed milk, and consequently, the net saving may not be as great as in instances where the milk is received directly in the urban area.

Many producers in the area throughout Northern New Jersey and the nearby counties of New York State deliver milk directly to plants where it is processed and packaged for the consumer. Also, in this same territory there are a number of plants which do not process milk but merely cool it and ship it to a processing plant at another location. With the development of farm bulk tank pickup, many farmers in this territory who formerly delivered to a country receiving and shipping plant now ship milk directly to a city processing plant.

Handlers receiving milk directly from producers at processing plants located within the 1-10 mile zone would avoid charges of 25 cents or more for operation of a country plant together with the fixed cost of transportation. The amount charged the city dealer by a country plant operator for these services usually is in excess of 25 cents. A direct delivery differential for milk delivered to a handler located in the 1-10 mile zone of 25 cents per hundredweight would tend to equate his cost of milk with the cost of a handler similarly located who receives his milk from a country plant. Likewise, handlers operating pasteurizing and bottling plants located outside the 1-10 mile zone but relatively near the metropolitan area could also afford to pay direct delivery differentials but at a declining rate as the distance from the metropolitan area increased.

The differential should be payable on all milk received by all plants in the designated area, and regardless of the type of operations conducted by the plant. All of the milk delivered by producers in this area is available for the fluid milk market and the fluid milk market is more than sufficient to absorb all of the milk produced in the nearby territory. Any attempt to vary the amount of differential based on the classification of the milk at the plant or upon the basis of whether the plant is conducting pasteurizing and bottling operations would be meaningless since competition would force handlers to pay premiums if direct delivery differentials applied to only a part of the milk. The differential payable at nearby plants should be based on the zone of the plant and should be tapered to disappear completely in the 81-90 mile zone. Handlers customarily have paid a premium over the uniform price to producers delivering to plants in the area covered by these differentials, and usually in considerably greater amounts than are required by these differentials. In line with a general policy of doing nothing under orders to significantly influence the development of the bulk tank method of delivery, it is concluded that no special differential should be provided for bulk tank delivery. The determination of any special value for such type of delivery should be left to private negotiation between the producer and the handler.

2. *Milk received by local distributors outside the metropolitan and nearby* [4216] *districts.* The best alternative milk supply for direct delivered milk by local dealers in Upstate districts is direct delivery by producers delivering milk to plants supplying metropolitan New York-New Jersey. Few Upstate local distributors would find country plant milk the lowest priced alternative to direct delivery milk.

As previously indicated in the analysis of conditions prevailing in each of the respective Upstate districts, the price paid to farmers in excess of the Order No. 27 uniform price for milk delivered to Upstate pasteurizing and bottling plants varies widely between districts and to a lesser

extent among dealers in the same district. In addition to the premiums noted in the preceding analysis, it appears that substantial premiums also are paid to about 1,150 producers in the proposed extended area in Upstate New York from whom milk is purchased on a so-called flat price without regard to butterfat test.

Analysis of the premiums paid by local dealers in Upstate New York indicates that they pay a price for milk which they find necessary to obtain the milk they want. In the procurement of a milk supply, they must compete with other local dealers, with other pool plants under Order No. 27, and in some cases, with dealers buying milk for markets outside the State of New York. Some of such out-of-State dealers operate country plants in the State of New York from which milk is shipped, and some, as in the case of Connecticut dealers, buy milk from farmers for direct delivery to their out-of-State distribution plants.

In the Capital District where a relatively high proportion of the nearby producers deliver to local distributors, where there are country plants supplying out-of-State markets and where distances from the milk production area to the urban area are relatively great, relatively high premiums are paid for direct delivered milk. Premiums also were paid in other parts of the Upstate New York area where density of population was great but at lower rates than in the Capital District. The city of Syracuse is the only other urban area in Upstate New York where the density of population over an extended area is comparable to the Capital District. Here, however, distance to production areas are less and the premiums paid were less than in Albany. Premiums in the Utica area were relatively small. They were not as large as in that part of the Mohawk District immediately adjacent to Schenectady. In most other areas, the local dealer pays little more than the uniform price for his direct delivered milk. In all districts, the minimum uniform price under Order No. 27 is the principal price making factor for the local distributor.

The desirability of providing in the order for payment

of a direct delivery differential in the Upstate territory depends to a considerable degree upon how the promulgation of regulation will affect the competitive situation of the local distributor. Order No. 27 prices are minimum prices and the local dealer, of course, will be permitted to pay premiums over the uniform price. With regulation, the local distributor will still be competing with other local distributors, with other Order No. 27 pool plants, and, in some districts, with buyers for out-of-State markets as at present.

If regulation is extended in the Upstate area, the Order No. 27 uniform price will continue to be the basic price making factor both for present pool plants and for local distributors. However, the price paid by the local distributor for milk for fluid use will be increased from his present paying price to the full Class I-A price and will apply uniformly at all plants in the same mileage zone. Since all of the local distributors tend to handle relatively small amounts of milk for other than fluid use, the requirement of paying a full Class I-A price will affect all local distributors to about the same degree. The institution of regulation for the local distributor will not change the competitive situation with respect to out-of-State buyers of milk.

With regulation, local distributors will be able to buy milk for other than fluid use at the Class III price rather than at the average price for all of their direct received milk as at present. Upstate dealers contend that, because of low volume and absence of facilities, they will be at a competitive disadvantage to the extent of 20 cents per hundredweight in the handling of Class III milk compared with plants specializing in the manufacture of dairy products. If that is the case, local dealers will have no incentive, even at the Class III price, to purchase more than the necessary minimum volume of milk for Class III uses. They will continue, however, to have an incentive to obtain direct delivered milk from producers with relatively uniform production seasonally and from whom milk is available

which otherwise best meets the requirements of the particular dealer, and may be expected to continue to pay premiums over the minimum uniform price to obtain such milk.

The proposed 15-cent rate of direct delivery differential was represented as a minimum over which premiums would be negotiated. That rate, however, exceeds the premium paid over the Order No. 27 uniform price by local dealers in some of the Upstate districts. If the fixing of a direct delivery differential resulted in a price higher than the price of alternative supplies there would be a tendency, in spite of the desire of more producers to obtain the differential, for local distributors to discontinue buying direct delivered milk and to obtain supplies from other sources. The apparent inapplicability of a single rate points, of course, to the desirability of some method of fixing different rates for different localities depending upon local conditions, if indeed, there is justification for a direct delivery differential of any amount.

Although premiums to producers over the uniform price undoubtedly will continue to be paid by dealers in various areas in Upstate New York, provisions should be made for the payment of direct delivery differentials on deliveries to producers delivering to plants in and around Albany and Syracuse in order to insure an orderly transition from nonregulated to regulated status. Such differentials should be paid for all milk delivered by producers to pool plants located in the area and at rates as follows:

| *County—City or township* | *Rate—dollars per hundredweight* |
|---|---|
| Albany: | |
| Albany | $0.10 |
| Colonie | .10 |
| Watervliet | .10 |
| Green Island | .10 |
| Cohoes | .10 |
| Guilderland | .05 |

| | |
|---|---|
| New Scotland | $0.05 |
| Bethlehem | .05 |
| Coeymanas | .05 |
| **Schenectady:** | |
| Schenectady | .10 |
| Glenville | .05 |
| Niskayuna | .05 |
| Rotterdam | .05 |
| **Montgomery:** | |
| Amsterdam (city) | .05 |
| Amsterdam (township) | .05 |
| **Saratoga:** | |
| Waterford | .10 |
| **Rensselaer:** | |
| Troy | .10 |
| Rensselaer | .10 |
| Brunswick | .05 |
| N. Greenbush | .05 |
| E. Greenbush | .05 |
| Schodack | .05 |
| **Onondaga:** | |
| Syracuse | .05 |
| Manlius | .05 |
| De Witt | .05 |
| Onondaga | .05 |
| Camillus | .05 |
| Solvay | .05 |
| Geddes | .05 |
| Salina | .05 |

Exceptions were taken to the proposed differential rates payable at plants in the city of Albany on grounds that operating conditions relating to producer receipts and dis-

tribution were no different at such plants than at plants just outside the city limits, thus subjecting operators of plants in the city to undue competitive disadvantage. Exceptions also were taken to the difference between the proposed rates in the city of Syracuse and those in surrounding towns on much the same basis and on the basis that the Syracuse rate is not in line with the historical pattern of producer payments. After reviewing these exceptions and the pertinent record evidence, it is concluded that the rate applicable at plants in Albany should be reduced to 10 cents (from 15) and that the rate at plants in the city of Syracuse should be reduced from 10 cents to 5 cents.

8. *Farm bulk tank milk.* Handlers proposed that milk picked up at the farm by a bulk tank truck be priced f. o. b. farm instead of f. o. b. first receiving plant. The producer groups supporting a single order acknowledged a growing problem but refrained from suggesting a solution at this time in order to expedite the solution of the larger problem of expanding the coverage of the order.

The solution proposed by the handlers involves a fundamental change in the method of pricing under the order. It involves such problems as (1) determining zones for all farms, (2) determining the value of milk at the farm in relation to its value at a nearby country plant, and (3) revised methods for determining what milk is to be subject to regulation under the order. Solutions to these [4217] problems require more evidence than was presented at this hearing. The delivery of farm bulk tank milk, while increasing, has not yet become sufficiently extensive to constitute a problem of proportions justifying amendments to deal with it at the same time that the other amendments herein provided for are made effective. Accordingly, adoption of the proposed changes relating to pricing bulk tank milk should be deferred until after further hearing.

9. *Basis of classification and allocation.* At the present time, the order requires that milk shipped from any plant to a plant in the marketing area in the form of milk be classified at the shipping plant, and that cream shipped

from a plant to a plant in the marketing area be classified at the shipping plant unless such cream is utilized in one of a limited number of products. The result is that milk shipped to any plant in the marketing area is classified in Class I-A and most of the cream shipped to the marketing area other than that used in ice cream or cream cheese is classified in Class II.

These provisions were designed to apply to shipments to the particular geographical area which constitutes the present marketing area rather than to a marketing area in the abstract. The characteristics of the marketing area which make such provisions practical are (1) nearly the entire milk supply is received from country plants rather than from farmers, and (2) surplus milk is manufactured near the country plant source rather than in the marketing area.

An extension of the present provisions to Upstate New York is unworkable because that area is an important production area as well as a consumption area. Milk is received here from over one-third of the producers whose milk will be subject to the order. Part of this milk must be moved to other plants to be utilized, either as fluid milk or in manufactured products. Many of the larger manufacturing plants are located in the area, and they receive surplus milk from many feeder plants. There was no proposal that present provisions apply in the Upstate New York territory.

Proponents of a single order suggested that the system applicable to the present marketing area be extended to Northern New Jersey. They contend that this area is a deficit area and that there is no reason to ship milk into the area for manufacturing purposes. The Northern New Jersey area, however, is also an important production area. Milk is received directly at plants in this area from nearly 3,000 farmers. At times, an individual receiver of this milk finds that he has a surplus in excess of his regular uses, and must dispose of it to some other handler. To require that such milk disposed of to a neighboring plant be auto-

matically classified as Class I-A would place an unnecessary burden upon the receiver of the milk and might result in the milk being turned back to producers. The system, therefore, should not be extended into the New Jersey part of the marketing area.

Handlers operating plants in the present area propose elimination of the country classification system on the basis that they should be in the same position as competing handlers in New Jersey or elsewhere receiving milk directly from producers, and that no other Federal order contains such a provision. It is concluded that the system should be abolished for the present marketing area.

This will mean, however, that some milk presently classified as Class I-A will be priced at a lower class price, and that the Class I-A price itself will be slightly lower resulting from operation of the formula. These facts have been taken into consideration in the revision of the Class I-A pricing formula.

The general accounting principles under the present order provide that milk from pool plants be assigned to Class I-A milk before milk from nonpool plants is so assigned. Handlers proposed that this provision be modified to permit the operator of an expressly designated pool plant to allocate his Class I-A to any source, and the operator of a shipping pool plant to allocate to any sources Class I-A in excess of that necessary to qualify the shipping plant as a pool plant. In this way, the maximum amount of Class I-A milk would be available for allocation to shipping plants in order to qualify them as pool plants. Such an optional assignment would open the door for other markets to shift the burden of their surplus to Order No. 27 producers, and thus, is inconsistent with the purpose of the amended pool plant provisions.

With the expansion of the marketing area, and the abolition of country plant classification for the present marketing area, some further prescribed method of allocating various sources of milk to Class I-A appears necessary. The expanded allocation rules, however, should avoid maximiz-

ing the number of plants qualifying as pool plants on the basis of meeting prescribed requirements for supplying the marketing area with fluid milk. Accordingly, the allocation rules should provide (1) that any handler operating a plant from which Class I-A milk is distributed in packaged form may first assign Class I-A milk resulting from such distribution to milk received at the plant directly from farmers, (2) that after such assignment (or if there is no such distribution), Class I-A milk be assigned to milk from expressly designated pool plants or to plants which themselves are temporary pool plants by reason of their own distribution (as under (1) above), and (3) that Class I-A milk, after such assignment to all such known sources of pool milk, may then be assigned to other plants at the option of the handler.

The combination of the elimination of country plant classification and the specified order of assignment of various sources of milk to Class I-A result in the operator of a country receiving and shipping plant which is not an expressly designated pool plant having less assurance than at present that a shipment to another plant in the marketing area will be classified as Class I-A, thus, be a basis for qualifying the shipping plant as a temporary pool plant.

10. *Base rating.* The proponents of a separate order for New Jersey and of a single order for the entire area both proposed the inclusion of a base rating plan. Under such a plan a producer is given a daily base or quota based on his deliveries in some specified period. Future deliveries of milk not in excess of his base are considered to be deliveries of base milk. Deliveries over and above his base deliveries are considered excess deliveries.

The price for excess milk is usually the lowest class price. The base price is the blend and usually reflects all of the utilization of milk in the higher priced classes. The base price would be higher than the uniform price for all milk without the application of the base rating plan. Producers with little excess milk would get higher returns than producers with large amounts of excess milk.

Among the reasons stated or implied in support of a base rating plan were the following:

1. It would result in a more equitable distribution of the returns for milk among farmers—i. e., the producer whose seasonal variation in production was small would receive more money for his milk, and the producer whose seasonal variation was great would receive less.
2. It would tend to lessen seasonal variation in production.
3. It would tend to discourage producers from delivering to pool plants part of the year and not in the remainder.
4. It would tend to discourage handlers from having a plant in the pool part of the year and not the rest.
5. Transportation differentials to producers could be improved by being applied to base milk and not surplus milk.
6. The application of nearby differentials out of the pool would be improved if paid on base milk and not on excess milk.
7. The producers delivering to Upstate local dealers and to the New Jersey dealers not under Order No. 27 have more even seasonal patterns of production than the pattern for present Order No. 27 producers as a whole, and therefore, they would get a higher share of the pool than they would without the plan.
8. In a separate order for New Jersey it would impede the movement of milk from the New York order to the New Jersey order.
9. If partially closed bases were applied, the effectiveness of the plan not only in connection with the seasonal pattern would be increased, but it also would tend to control total production.

The plan was opposed by handlers on the basis that it would require a vast amount of additional accounting work and that there is no desirable objective to be achieved at the present time. The proposal also was opposed by representatives of producers in distant areas who looked on this as an

additional method of reducing the proportion of the total pool to be distributed to distant producers.

The proponents generally agreed on the base forming period with proponents of separate orders proposing August-November and September-December base forming periods and with proponents of [4218] a single order favoring a July-November period. Each of these periods include the months when production is relatively low in comparison to consumption. Partially closed bases also were proposed under the separate order for Northern New Jersey. Experience with base rating plans in other markets has shown a tendency for a sharp decline in production immediately prior to a base forming period. The inclusion of July in the base period would tend to avoid this development in the New York-New Jersey area.

There is a great variety of seasonal patterns of production among the farmers of the New York-New Jersey milkshed. The record does not show, however, how returns to producers with the various patterns would be affected by the application of the plan. It does not show what base prices might be expected in relation to the uniform price. It does not show how average returns to producers in the different sections of the milkshed would be affected, although data available on a county basis indicate that the results may not be those anticipated by either the proponents or the opponents.

Where, as is true for the New York-Northern New Jersey market, there is at present and in prospect an adequate supply of milk from presently approved sources in the season of shortage production and adequate facilities for handling the seasonal surplus, the need for a base rating plan to encourage a more uniform seasonal pattern of production is not as great as it otherwise would be. It was not established that a shift in the seasonal pattern of milk in excess of fluid requirements would be advantageous or desirable, particularly a shift to higher volumes in the winter months of December through February.

A base rating plan has never been operated in a market with as many producers and handlers as in the New York-Northern New Jersey market.

There was a pronounced absence of agreement on the period in which bases should be used in paying producers. The single order proponents proposed that the period be March through June. Two of the three separate order proponents proposed that payments be made on bases in all twelve months. Payments on bases only in April, May, and June also was proposed. There was no analysis to show what would be the difference in returns to the various types of producers under the several payment periods proposed.

In view of the apparent widespread desire for some form of base rating plan, however, the order should provide for a means of obtaining the necessary data to analyze the value of the plan and to determine if one is administratively feasible in a market of this size. Provision should be made, (1) for the computation by the market administrator of bases on the basis of deliveries of producers during the period July-November 1957, (2) for the announcement of such bases, and (3) beginning with March 1958, the computation by handlers of base and excess milk received from each producer. However, no provision should be made for payments on bases established earlier than in a base forming period starting no earlier than July 1, 1958, and then only in accordance with terms and provisions formulated after further hearing.

Further evidence is needed, not only relating to aspects of a base rating plan previously noted, but also relating to the transfer of bases and so-called hardship cases concerning which the evidence presented at the hearing is incomplete and inadequate. Some provision for alternative bases related to deliveries in the base paying period is ordinarily made in connection with base rating plans in lieu of attempting to deal administratively with so-called hardship cases on an individual basis with no rules insuring uniformity of treatment. The record provides no basis for the

establishment of such alternative bases, or other realistic means of handling hardship cases and related problems.

11. *Producer-dealers.* It is concluded that the pricing and pooling provisions of the order should not apply (1) to milk produced on the farm of a handler operating a pasteurizing and bottling plant if no fluid milk is received from any other plant or from dairy farmers, and (2) to milk produced on a handler's own farm up to an average of 800 pounds per day and which is received at a plant operated by the handler and at which plant milk is received from other plants but not from dairy farmers.

The production of milk by dealers' own herds in Northern New Jersey totaled 58,527,087 pounds in 1955 or 4.6 percent of the total volume of fluid milk sold in the area. In 1955, a monthly average of 93 producer-distributors produced a monthly average volume of 4,877,257 pounds of milk. Included in this total is the production of one large dealer who produces and distributes approximately 10,000 quarts daily of high butterfat content milk which is sold as a premium milk. This dealer also purchases and distributes milk received from between 170 to 190 dairy farmers and owns and operates a receiving plant which is presently regulated by Order No. 27.

By excluding the own herd production of this dealer from the average monthly production in 1955, the remaining 92 producer-distributors in Northern New Jersey produced an average of 713 quarts (1,533 pounds) daily. While the record does not indicate this precise number of dealers with own farm production who produced more or less than this average, it does show that a substantial number are dealers with own herd production and who also buy substantial volumes of milk from farmers. It is expected that the volume of own herd milk of these dealers is substantially higher than the average, and accordingly, that the average daily production of the remaining producer dealers, that is, farmers engaged primarily in production and in the distribution of their own milk, is substantially less than the average for the entire group of 92.

The production of milk by dealers' own herds in the area of Upstate New York proposed for inclusion in the marketing area amounted to 93,531,000 pounds in 1955, an amount equivalent to about 10 percent of the volume of milk sold for fluid use in the same area. It varied from a low of about 5 percent in the Binghamton District to a high of about 25 percent in the Elmira District.

In 1955, there were 313 dealers with own farm production in the Upstate New York area proposed for inclusion in the marketing area. Of this number 243, or 77 percent, were dealers with own farm production of less than 500 quarts per day with an average of about 235 quarts, ranging from 183 in the South Central District to 334 in the Elmira District. Of the remaining 70 dealers with own herd milk in excess of 500 quarts per day, there were 55 with own herd milk averaging less than 1000 quarts daily, 8 between 1000 and 1500 quarts, 4 between 1500 and 2000 quarts, and 3 averaging over 2000 quarts. The production of all dealers' own herd milk averaged 382 quarts per herd, ranging from 318 in the Capital District to 764 in the Elmira District.

The total own farm production of this group of dealers with own farm production of less than 500 quarts per day constituted less than one-half the total deliveries of milk from dealers' own herds. In the Capital District, where there were 75 dealers with own herd production averaging 202 quarts per day, the volume of such production constituted slightly more than one-half of the total production of dealers' own herd milk, and about 5 per cent of total fluid sales. In the Elmira District, where the milk received from dealers' own herds was equal to about 25 percent of total fluid sales in the district, the production of dealers' own herds averaging less than 500 quarts per day was slightly less than 25 percent of the total receipts from dealers own herds, and equivalent to less than 7 percent of the total fluid sales in the district.

The receipts of milk from a handler's own farm is completely exempt from equalization under the order at the present time and the volume of such milk is relatively small.

In the Upstate New York and Northern New Jersey areas, however, there are a large number of dealers with own farm production and the volume of such milk is larger in relation to total fluid sales. Dealers with own farm production in the Upstate New York and Northern New Jersey areas at present are in competition with dealers buying milk from producers for which no minimum price was established or for which the dealer now pays the Class I-C price. Upon extension of the area, however, dealers in these areas will be required to pay the Class I-A price for milk in fluid use. This will materially increase the competitive advantage accruing to dealers with own farm production if such production continues to be fully exempt from equalization. Such advantage would constitute an unwarranted incentive for additional producers to engage in distribution and for the expansion of own farm production by those presently engaged in distribution at the expense of other handlers whose entire supply of milk is fully regulated.

Handlers who depend entirely upon their own production as a source of supply and who do not burden the pool with any surplus or excess supplies should be subject to the order only to the extent that they must submit reports to the market administrator as required and [4219] make available to the market administrator accounts records and facilities, so that the market administrator may verify the reports submitted.

Since the own farm production of 242 out of a total of 313 dealers in Upstate New York averaged 235 quarts (about 500 pounds) in 1955 and since the own farm production of 92 dealers (which includes large as well as small dealers) in Northern New Jersey averaged 713 quarts (about 1,533 pounds), it appears that an exemption of own farm production up to 800 pounds per day in the case of handlers who receive no milk from other dairy farmers but who may receive milk from other plants will exempt from regulation a large majority of producer-handlers, and at the same time not be sufficiently large to constitute a serious competitive factor in the marketing area.

Any handler with own farm production and who purchases milk from other dairy farmers would have the obligation of accounting to the pool for such milk and of paying such other farmers. Consequently such a handler could not be fully exempt from regulation even though his own production did not exceed 800 pounds.

Exceptions were also made to the failure of the recommended decision to provide an exemption for custom-bottle own farm milk. It appears that such a provision would create serious administrative difficulties and provide opportunity for engaging in practices which would tend to defeat the overall objectives of the regulation and be contrary to the interests of other producers and handlers.

Exceptions were submitted to the failure to provide for quota exemption from pricing and pooling for all handlers with own farm production regardless of whether milk is received by the producer-handler from other plants or from dairy farmers. Such a quota would be based on operations during a past period. This type of exemption appears to constitute unwarranted discrimination against those not in operation prior to the effective date of such a provision.

The order presently provides for exemption of the production of handlers' farms located in New York City. Exception was taken by such producer-handlers (who are extremely limited in number) to the failure of the recommended decision to provide for continued exemption of their milk from the pricing and pooling provisions of the order on the basis that no evidence was presented at the hearing justifying a change in their status. It is concluded that such exemption should be continued.

There is one farm in the State of New York and one in Northern New Jersey engaged in the production of milk in accordance with methods and standards of the American Association of Medical Milk Commission for the production of certified milk. Such milk currently is exempt from regulation under the order. Production requirements for certified milk are more rigid than for other milk and all such milk must be bottled on the farm where produced and where no

milk is received from other sources. Certified milk sells for a price substantially higher than for other milk and is sold under conditions not generally competitive with other milk. The circumstances under which certified milk is produced and marketed are such that an expansion in its production sufficient to constitute a disturbing factor in the market appears extremely remote. The number of farms in New York State engaging in the production of certified milk has declined during the past 10 years from 14 to 1. Sales of such packaged certified milk should be exempt from regulation.

To insure that the surplus milk of producer-handlers does not burden the pool, any milk shipped to another plant, except certified milk in consumer packages, should be treated as nonpool milk and be subject to compensatory payments if assigned to Class I-A or Class II. This will prevent a producer-handler from diluting the pool and obtaining a share of the fluid market of other producers who have no share in the fluid sales of the exempt producer-handlers.

Any milk delivered to a partially exempt producer-handler by another handler should be assigned to such producer-handler's Class I-A use. Such producer-handler's nonexempt production should then be prorated to the classification of his entire production. Any of his milk shipped to another handler and on which such other handler is required to pay compensatory payments should be considered Class III for purposes of pricing the producer-handler's nonexempt milk.

12. *Flat price buyers.* Milk purchased from producers on a so-called "flat price basis" (without regard to butterfat test) should be pooled as milk containing 3.5 percent butterfat, and producers should be paid, as a minimum, the uniform price for 3.5 percent. This arrangement, however, should be regarded as temporary, and should be limited to milk purchased by handlers who receive milk from no more than 10 producers and on no part of which tests are made for butterfat content.

During 1955, there were 281 dealers in Upstate New York who bought milk from 1,145 farmers on a flat price basis, or an average of four producers per dealer. This constituted nearly 25 percent of all farmers delivering to local dealers and slightly less than 23 percent of the total volume of direct deliveries. Only slight variations existed between districts in the Upstate area in the average number of such producers per dealer. In some instances, milk was purchased on this basis by dealers who bought milk from other producers on the basis of butterfat content. In most instances, however, the milk purchased on this basis was purchased by small dealers who purchased milk only on this basis.

A substantial part of the milk purchased on a flat price basis was milk of relatively high butterfat content and distributed by the dealer as high test milk. The prices paid for milk purchased were considerably higher than prices paid by other local dealers for 3.5 percent milk including premiums other than extra butterfat. In view of the relatively high premiums paid for milk purchased on a flat price basis, it appears reasonable to expect that these premiums will continue to be paid for milk testing in excess of 3.5 percent even though the minimum uniform price is established on that basis.

Upstate dealers proposed that this flat price milk be pooled on the basis of the average test of all other milk in the pool. The pooling of such milk as milk containing 3.5 percent butterfat is only slightly different insofar as the handler's obligation to the pool is concerned, but from an accounting point of view it will be easier for handlers in making the required reports and in settling with the producer settlement fund if the butterfat test to be used for accounting purposes is known prior to computation of the uniform price, and if the butterfat test at which they account for milk is the test for which minimum prices are announced.

This method of accounting for milk purchased on a flat price basis appears necessary as a temporary measure since

numerous small dealers presently are not equipped to make butterfat tests, and since the market administrator, although authorized to conduct a weighing and testing program, may not be prepared at this time to conduct such a program on such a large scale. Provision for pooling on a 3.5 percent basis, however, should be discontinued as soon as possible and should be authorized only in the case of small dealers not equipped or otherwise presently not in a position to make butterfat tests. Dealers purchasing milk from some producers on a flat price basis but also from other producers on the basis of butterfat tests should be required to account on the basis of butterfat tests for all milk purchased.

13. *Nearby cooperative payments.* The supplemental notice of hearing dated February 26, 1957, includes a proposal that provision be made for cooperative payments for a cooperative representing the interest of nearby producers. Such proposal includes a statement by the proponents that such payments should be justified independently and that the basis for cooperative payments now provided under the order should not be relied upon. No evidence was presented at the hearing purporting to be in support of this proposal and, accordingly, the proposal should not be adopted.

14. *Other order provisions.* The proponents of a single order presented evidence in support of the inclusion in such an order for the expanded marketing area all of the present provisions of Order No. 27 in addition to those specifically considered in connection with the foregoing issues 1 through 13. The provisions to which such evidence was presented include among others most of the definitions, the appointment, power and duties of the market administrator, class definitions and class prices, butterfat differentials, reports, computations of the uniform price, payments to producers, operation of the producer-settlement fund, expense of administration, and cooperative payments. Testimony also was presented by others in opposition to provisions of the order for cooperative payments. Such testimony, however, was directed at the principle of cooperative payments rather

than to any [4220] question of inapplicability by reason of expansion of the marketing area, and was not of sufficient substance to justify any change in the present provisions of the order relating to cooperative payments.

Exception was taken to provisions in the proposed order for a butterfat differential of 4 cents per point applicable to Class I-A and Class I-B milk. Although testimony was presented on a proposed butterfat differential of 6 cents per point under provisions of the proposed separate order for Northern New Jersey, no evidence was presented supporting a change in the butterfat differential of 4 cents as a provision of a single order for the expanded marketing area. Accordingly, the differential should not be changed at this time. Except for minor co-ordinating amendments, all provisions of the order not herein specifically amended are provisions which together with the amended provisions constitute appropriate terms and provisions of regulation for the expanded area.

Several provisions presently a part of the order, and not elsewhere specifically referred to herein, have been eliminated, however, from the proposed amended order since they are rendered inapplicable and unnecessary by amendments effectuating the findings and conclusions herein set forth or have become obsolete due merely to passage of time, among which are (1) the definition of Northern New Jersey, (2) provisos in present § 927.40 (a) and (a) (1) relating to Class I-A prices for periods now past, (3) the provision (paragraph (1) of present § 927.76) for adjustment period in connection with cooperative payments, and (4) a provision in present § 927.55 requiring retention of certain books and records until October 1, 1949.

This hearing having been held jointly not only with the State of New York but also with the State of New Jersey, reference to the latter has been included in the provision relating to expense of administration (amended § 927.90).

No change has been made herein in provisions of the order (paragraphs (d) and (e) of present § 927.61) for adding unreserved cash and deducting specified amounts in connec-

tion with computation of the uniform price. Likewise, no provision is made in connection with payments for expense of administration (pursuant to present § 927.80) for the separation of funds on hand as of the effective date of the amendments herein set forth from payments to be made thereafter.

The amended order includes a provision requiring operators of plants which will be newly regulated thereunder to file reports by not later than the 10th day of the month in which the amended order becomes effective; such reports being those relating to the receipts and disposition of milk at such plants for the preceding month. This requirement is designed to provide an opportunity for newly regulated handlers to obtain experience and proficiency in the filing of reports prior to the time (one month later) when such reports will be required as a basis for determining their obligations for making payments to the pool and to producers for milk received during the first month after the effective date of the amended order. No significant, if any, additional obligation on the part of such handlers in the keeping of records needed for the filing of such reports is contemplated since most of such handlers already maintain the necessary records in compliance with regulations of the States in which their plants are located.

*Rulings.* Within the period reserved therefor, interested parties filed exceptions to certain of the findings, conclusions and actions recommended by the Deputy Administrator. In arriving at the findings, conclusions, and regulatory provisions of this decision, each of such exceptions was carefully and fully considered in conjunction with the record evidence pertaining thereto. Certain of the findings and conclusions contained in the recommended decision have been modified after consideration of the exceptions filed.

To the extent that findings, conclusions and actions decided upon herein are at variance with any of the exceptions filed to the recommended decision, such exceptions are overruled. Rulings contained in the recommended decision

upon proposed findings and conclusions submitted by interested persons are affirmed except as modified by the findings and conclusions set forth herein. To the extent that findings and conclusions proposed by interested persons are not ruled upon in the recommended decision and are inconsistent with the findings and conclusions contained herein, the specific or implied requests to make such findings and reach such conclusions are denied on the basis of the facts found and stated in connection with the conclusions herein set forth.

Interested parties requested, in briefs filed following the close of the hearing, a review of rulings of the presiding officer at the hearing denying motions (1) to recall the supplemental notice of hearing issued on February 26, 1957 (22 F. R. 1219), and (2) that certain witnesses who had testified prior to the issuance of such supplemental notice be recalled for further cross-examination in the light of the supplemental notice.

The ruling of the presiding officer on the first motion was made on March 5. The motion was based on unsupported assertions of the illegality of the notice. At no time, however, did any interested party request a continuance on grounds of insufficient time to prepare. The hearing continued through March 29 during which time, and as late as March 25, witnesses who previously had testified on behalf of proponents of proposals set forth in the supplemental notice of February 29 were available for cross-examination. The supplemental notice of hearing of February 26, 1957, did not expand the area or scope of regulation beyond that set forth in the earlier notices, but merely contained additional specific proposals relating to the form of regulation. The alleged illegality of the supplemental notice has not been established. The reasons here stated being sufficient, it is deemed unnecessary to discuss additional reasons. Accordingly, the ruling of the presiding officer on this motion is affirmed and the exceptions taken thereto are denied.

The ruling of the presiding officer on the second motion (recall of certain witnesses) has been reviewed and is

affirmed for the reasons stated by the presiding officer in connection with his ruling.

*General findings.* (a) The tentative marketing agreement and the order, as hereby proposed to be amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the Act;

(b) The parity prices of milk as determined pursuant to section 2 of the act are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the marketing area, and the minimum prices specified in the proposed marketing agreement and the order, as hereby proposed to be amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest, and

(c) The tentative marketing agreement and the order, as hereby proposed to be amended, will regulate the handling of milk in the same manner as, and will be applicable only to persons in the respective classes of industrial and commercial activity specified in, a marketing agreement upon which a hearing has been held.

*Marketing agreement and order.* Annexed hereto and made a part hereof are two documents entitled, respectively, "Marketing Agreement Regulating the Handling of Milk in the New York-New Jersey Marketing Area", and "Order Regulating the Handling of Milk in the New York-New Jersey Marketing Area", which have been decided upon as the detailed and appropriate means of effectuating the foregoing conclusions.

*It is hereby ordered.* That all of this decision, except the attached marketing agreement, be published in the FEDERAL REGISTER. The regulatory provisions of said marketing agreement are identical with those contained in the attached order which will be published with this decision.

***Referendum order; determination of representative period; and determination of referendum agent.*** **It is hereby directed that a referendum be conducted to determine whether the issuance of the attached order regulating the**

handling of milk in the New York-New Jersey milk marketing area is approved or favored by the producers, as defined under the terms of such order, and who, during the representative period, were engaged in the production of milk for sale within the aforesaid marketing area.

The month of March 1957 is hereby determined to be the representative period for the conduct of such referendum.

For purposes of this referendum, the plants which shall be deemed to have been pool plants in March 1957 are as follows: (1) Plants which were pool plants under Order No. 27 in such month; (2) plants at which 25 percent or more of the milk received from farmers during such month was disposed of as fluid [4221] milk in any part of the New York-New Jersey milk marketing area; and (3) plants from which in such month any packaged milk was distributed in such marketing area, and at which plant the handling of milk was not regulated under another order issued pursuant to the act.

C. J. Blanford is hereby designated as agent of the Secretary to conduct a ballot box referendum and, except as set forth herein, such referendum shall be conducted in accordance with the procedure for the conduct of referenda to determine producer approval of milk marketing orders as published in the FEDERAL REGISTER on August 10, 1950 (15 F. R. 5177), and shall be completed on or before June 29, 1957.

In lieu of the provisions set forth in paragraph 4 of the published procedure, the above designated agent of the Secretary shall comply with the following procedure:

(a) Ascertain which producers are eligible to vote.

(b) Ascertain the name and location of any cooperative association of which any such eligible producers are members.

(c) Ascertain which of such cooperative associations have been determined by the Director of the Dairy Division, Agricultural Marketing Service, to be qualified to vote for their producers.

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(d) Ascertain which qualified cooperative associations desire to cast a ballot on behalf of their eligible producers.

(e) Obtain from each qualified cooperative association ascertained under (d) a certified list of producers who are members of, stockholders in, or under contract with such association, and inform such associations that refusal or failure to permit immediate verification of the certified list of producers and of the relations of such producers to the cooperative association shall be deemed to be a decision by such association not to vote on behalf of its producers.

(f) Designate the polling places, the day for the referendum, and the hours during which such polling places shall be open and closed: *Provided*, That all polling places shall remain open not less than four hours during such day.

(g) Give notice of the day, places and hours of polling by (1) public dissemination of such information through the press and other media of publicity; (2) posting such information at each polling place at least one day prior to the day of balloting, and having available at such places copies of the order on which the referendum is to be conducted; (3) notifying all county agents within the milkshed of the date, places and hours of polling, and providing them with copies of the order; and (4) using such other means as the referendum agent may deem effective.

(h) Appoint the person or persons who shall be in charge of each polling place, and instruct all such officers as to the conduct of the referendum and the manner of transmittal of the ballots.

(i) Supervise the counting and tabulation of all ballots cast.

(j) During the period within which the referendum is to be conducted, present to each handler defined in the order who operates a pool plant a copy of the marketing agreement, containing identical terms, for his signature.

(k) Upon completion of the balloting, tabulate such ballots in a manner which will show the total number of known eligible producers, the number of producers voting in the referendum, the number of producers favoring and the num-

ber opposed to the issuance of the order, and the number of producers whose ballots were disqualified. (If, in checking the ballots, it is found that any ballots were cast by persons who were not producers during the representative period, such ballot shall be disqualified. Likewise, if a ballot is cast by any person whose name appears on the list of producers on whose behalf a qualified cooperative association is voting such ballot shall be disqualified.)

(l) Within 4 days after the close of the referendum, transmit to the Secretary, for the attention of the Director of the Dairy Division, the information tabulated pursuant to paragraph (k). As soon as possible after such information has been forwarded to the Secretary, submit to him a complete report of all action taken in connection therewith.

As a means of effectuating certain policies jointly adopted by the Secretary and the Commissioner of Agriculture and Markets of the State of New York in a memorandum of cooperation dated August 26, 1938, and by the Secretary and the Director of the New Jersey Office of Milk Industry in a memorandum of agreement dated June 30, 1955, the designated agent of the Secretary shall, at the same time he transmits his report to the Secretary, also transmit a similar report to the Commissioner of Agriculture and Markets of the State of New York, and to the Director of the Office of Milk Industry of the State of New Jersey.

Issued at Washington, D. C., this 10th day of June 1957.

[SEAL]

EARL L. BUTZ,
*Acting Secretary.*

1957 AMENDATORY ORDER

*Order*[1] *Regulating the Handling of Milk in the New York-New Jersey Milk Marketing Area*

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AUTHORITY: §§ 927.0 to 927.99 issued under sec. 5, 49 Stat. 753, as amended; 7 U.S.C. 608c.

§ 927.0 *Findings and determinations.* The findings and determinations hereinafter set forth are supplementary and in addition to the findings and deter- [4222] minations previously made in connection with the issuance of the aforesaid order and of the previously issued amendments thereto; and all of said previous findings and determinations are hereby ratified and affirmed, except insofar as such findings and determinations may be in conflict with the findings and determinations set forth herein.

1957 AMENDATORY ORDER

(a) *Findings upon the basis of the hearing record.* Pursuant to the provisions of the Agricultural Marketing Agreement Act of 1937, as amended (7 U. S. C. 601 et seq.), and the applicable rules of practice and procedure governing the formulation of marketing agreements and marketing orders (7 CFR 900), a public hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the New York-New Jersey milk marketing area. Upon the basis of the evidence introduced at such hearing and the record thereof, it is found that:

(1) The said order as hereby amended, and all of the terms and conditions thereof, will tend to effectuate the declared policy of the act;

(2) The parity prices of milk, as determined pursuant to section 2 of the act, are not reasonable in view of the price of feeds, available supplies of feeds, and other economic conditions which affect market supply and demand for milk in the said marketing area, and the minimum prices specified in the order as hereby amended, are such prices as will reflect the aforesaid factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest;

(3) The said order as hereby amended, regulates the handling of milk in the same manner as, and is applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held.

(4) All milk and milk products handled by handlers, as defined in the order as hereby amended, are in the current of interstate commerce or directly burden, obstruct, or affect interstate commerce in milk or its products; and

(5) It is hereby found that the necessary expense of the market administrator for the maintenance and functioning of such agency will require the payment by each handler, as his pro rata share of such expense, 2 cents per hundredweight or such amount not to exceed 2 cents per hundred-

weight as the Secretary may prescribe, with respect to milk received from producers.

*Order relative to handling.* It is therefore ordered, that on and after the effective date hereof, the handling of milk in the New York-New Jersey milk marketing area shall be in conformity to and in compliance with the terms and conditions of the aforesaid order, as amended, and as hereby further amended to read as follows:

DEFINITIONS

§ 927.1 *Act.* "Act" means Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended.

§ 927.2 *Secretary.* "Secretary" means the Secretary of Agriculture or any officer or employee of the United States who is, or who may hereafter be, authorized to exercise the powers and to perform the duties of the Secretary of Agriculture.

§ 927.3 *Marketing area.* "New York-New Jersey milk marketing area" (hereinafter called the "marketing area") means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section together with all piers, docks and wharves connected therewith, and all craft moored thereat, and including territory within such boundaries which is occupied by Government (Municipal, State, Federal or International) reservations, installations, institutions or other establishments.

(a) The city of New York and counties of Nassau, Suffolk (except Fisher's Island) and Westchester in the State of New York (such territory being referred to hereinafter as the "New York metropolitan district").

(b) The following counties and parts of counties in the State of New York: Albany; Broome; Cayuga (except the townships of Sterling, Victory, Conquest, and Montezuma); Chemung; Chenango; Columbia; Cortland; Delaware; Dutchess; that part of Essex consisting of the townships

of Schroon, Ticonderoga, Crown Point, and Moriah; Fulton (except the township of Stratford); Greene; Herkimer (except the townships of Webb, Ohio, and Salisbury); Madison; Montgomery; Oneida (except the townships of Ava, Boonville, Forestport, and Florence); Onondaga; Orange; Oswego (except the townships of Redfield and Boyleston); Otsego; Putnam; Rensselaer; Rockland; Saratoga (except the townships of Day, Edinburg, and Providence); Schenectady; Schoharie; Schuyler; that part of Steuben consisting of the townships of Addison, Corning, and Erwin; Sullivan; Tioga; Tompkins; Ulster; Warren (except the townships of Johnsburg, Thurman, and Stony Creek); Washington; and Yates (except the townships of Italy, Middlesex, and Potter); and in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren.

§ 927.4 *Person.* "Person" means any individual, partnership, corporation, association, or any other business unit.

§ 927.5 *Dairy farmer.* "Dairy farmer" means any person who produces milk.

§ 927.6 *Producer.* "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

§ 927.7 *Handler.* "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers

with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

§ 927.8 *Plant.* "Plant" means the land, buildings, surroundings facilities, and equipment, whether owned or operated by one or more persons, constituting a single operating unit or establishment for the receiving, handling, or processing of milk or milk products as determined by the market administrator.

§ 927.9 *Pool plant.* "Pool plant" means any plant which is designated as a pool plant pursuant to § § 927.25, 927.28, or 927.29.

§ 927.10 *Market administrator.* "Market administrator" means the agency, which is described in § § 927.20 through 927.23 for the administration of this part.

§ 927.11 *Base.* "Base" means a quantity of milk expressed in pounds per day or month computed pursuant to § 927.60.

§ 927.12 *Base milk.* "Base milk" means the milk delivered by a producer during the month in an amount which is not in excess of his base.

§ 927.13 *Excess milk.* "Excess milk" means all milk delivered by a producer in excess of base milk.

## MARKET ADMINISTRATION

§ 927.20 *Selection, removal, and bond.* The agency for the administration of this part shall be a market administrator who shall be a person selected and subject to removal by the Secretary. The market administrator shall, within 45 days following the date upon which he enters upon his duties, execute and deliver to the Secretary a bond, conditioned upon the faithful performance of his duties, in an amount and with surety thereon satisfactory to the Secretary.

§ 927.21 *Compensation.* The market administrator shall

be entitled to such reasonable compensation as shall be determined by the Secretary.

§ 927.22 *Powers.* The market administrator shall have the following powers:

(a) To administer the terms and provisions of this part;

(b) To make rules and regulations to effectuate the terms and provisions of this part;

(c) To receive, investigate, and report to the Secretary complaints of violations of this part; and

(d) To recommend to the Secretary amendments to this part.

§ 927.23 *Duties.* The market administrator, in addition to the duties hereinafter described, shall:

[4223] (a) Keep such books and records as will clearly reflect the transactions provided for in this part;

(b) Submit his books and records to examination by the Secretary at any and all times;

(c) Furnish such information and such verified reports as the Secretary may request;

(d) Obtain a bond with reasonable security thereon covering each employee who handles funds entrusted to the market administrator.

(e) Publicly disclose, after reasonable notice, the name of any person who has not made reports pursuant to §§ 927.50, 927.51, and 927.53, or made payments required by §§ 927.70, 927.71, 927.72, 927.77, 927.80, 927.82, 927.83, 927.84, and 927.90;

(f) Prepare and disseminate for the benefit of producers, consumers, and handlers such statistics and information concerning the operation of this part, as amended, as do not reveal confidential information;

(g) Employ and fix the compensation of such persons as may be necessary to enable him to administer the terms and provisions of this part;

(h) Pay out of the funds received pursuant to § 927.90 the cost of his bond and of the bonds of such of his employees as handle funds entrusted to the market administra-

tor, his own compensation, and all other expenses which will necessarily be incurred by him for the maintenance and functioning of his office and the performance of his duties;

(i) Maintain a main office and such branch offices as may be necessary; and

(j) Promptly notify a handler, upon receipt of the handler's written request therefor, of his determination; as to whether one or more plants exist at a specified location, as to whether any specified item constitutes a part of the handler's plant, or as to which plant a specified item is a part in the event that the particular premises in question constitutes more than one plant: *Provided*, That if the request of the handler is for revision or affirmation of a previous determination, there is set forth in the request, a statement of what the handler believes to be the changed conditions which make a new determination necessary. If a handler has been notified in writing of a determination with respect to an establishment operated by him, any revision of such determination shall not be effective prior to the date on which such handler is notified of the revised determination.

POOL PLANTS

927.25 *Regular pool plants.* Any plant shall be designated a pool plant upon determination by the Secretary that the provisions of paragraphs (a) through (d) of this section have been met. Not later than the end of the month following the month in which an application is received by the Secretary pursuant to paragraph (a) of this section, the Secretary shall either determine that the provisions of paragraphs (a) through (d) of this section either have been met or have not been met, or notify the applicant that additional information is needed prior to making a determination. Such designation shall be effective the first of the month following the date of designation and shall continue until such designation is cancelled pursuant to § 927.27: *Provided*, That notwithstanding the provisions of paragraphs (a) through (d) of this section, any plant which for

the month of June 1957 had a designation pursuant to § 927.20, § 927.22, or this section, as then in effect, and which is not cancelled prior to the effective date of this section, is hereby designated a regular pool plant from the effective date of this section until such designation is cancelled pursuant to § 927.27: *Provided further,* That notwithstanding the provisions of paragraphs (a) through (d) of this section, any plant for which an application is filed by the operator with the market administrator by not later than 15 days after the effective date of this section, and (1) which had a pool plant designation of any kind for each of the 12 months of April 1956 through March 1957, or (2) as to which it is determined by the market administrator that 50 percent or more of the milk received at the plant from dairy farmers during the 12-month period of April 1956 through March 1957 was utilized as fluid milk in the marketing area, is hereby designated a regular pool plant from the effective date of this section until such designation is cancelled pursuant to § 927.27.

(a) An application by the operator of the plant for such determination has been addressed to the Secretary and filed at the office of the market administrator: *Provided,* That if 50 percent of more of the dairy farmers delivering milk at such plant deliver such milk for the account of a cooperative association which does not operate the plant but for which milk such association receives payment, an application must be filed by such cooperative association as well as the person operating the plant.

(b) The plant is located in New York, New Jersey, or Pennsylvania: *Provided,* That if such plant is located in Pennsylvania within 200 miles of Philadelphia, it shall be eligible only if it is in a county bordering the marketing area or is closer to the marketing area than it is to Philadelphia, distance to the marketing area being the same as that used for zoning plants pursuant to § 927.42, and distance to Philadelphia being the shortest highway mileage computed by the market administrator from data contained in Mileage

Guide No. 5 issued on July 20, 1949, effective August 21, 1949, by the Household Goods Carriers' Bureau, Agent, Washington, D. C.

(c) The plant was a pool plant either pursuant to paragraphs (a) and (b) of § 927.29, or pursuant to § 927.27 as in effect immediately prior to the effective date of this part, for each of the 12 months immediately preceding the month during which an application is filed.

(d) The operating requirements of § 927.26 are being met.

§ 927.26 *Operating requirements* The person operating the plant shall meet each of the following requirements:

(a) Be willing to dispose of as Class I-A milk in the marketing area milk received at the plant from dairy farmers;

(b) Keep such control over the sanitary conditions under which milk received at the plant is produced and handled, that the plant can meet the requirements of a source of milk for the marketing area: *Provided,* That approval by a health authority of the plant as a source of milk for the marketing area shall constitute sufficient evidence that this requirement is being met even though such approval is restricted to prohibit shipment to the marketing area of milk for specified periods during which permission is given by such health authority for receiving unapproved milk or skim milk at the plant or for shipment of approved skim milk from such plant; and

(c) Have no commitments for disposition of milk that prevent him from utilizing milk as set forth in § 927.27 (g).

§ 927.27 *Suspension and cancellation of designation.* The designation of a pool plant pursuant to § 927.25 or § 927.28 may be suspended or cancelled under any of the following provisions:

(a) The designation shall be cancelled effective on the first of the month following the filing with the market administrator, and on a form prescribed by him, of an appli-

cation by the handler operating the plant: *Provided,* That such application for cancellation shall be accompanied by proof that the handler, if not a cooperative association qualified pursuant to § 927.81, has notified any qualified cooperative association which has any members who deliver milk to such plant, and has notified individually all producers delivering to such plant who are not members of such qualified cooperative association, of his intention to make such application: *Provided further,* That if 50 percent or more of the producers delivering milk at such plant deliver such milk for the account of a cooperative association which does not operate the plant, but for which milk such association receives payment, an application must be made by such cooperative association as well as by the handler operating the plant: *Provided further,* That such plant shall not be a pool plant on any basis from the effective date of cancellation until after the next continuous period of April through June.

(b) The designation of any plant which on June 15 of any year is not approved by a health authority as a source of milk for the marketing area shall be automatically suspended effective on August 1 of such year unless the absence of such approval is a temporary condition covering a period of not more than 15 days: *Provided,* That the designation of a plant approved by a health authority as a source of milk for the marketing area, even though such approval is restricted to prohibit shipment to the marketing area of milk for specified periods during which permission is given by such health authority for receiving unapproved milk or skim milk at the plant or for shipment of approved skim milk from such plant, shall not be suspended pursuant to this provision.

[4224] (c) The designation of any plant shall be suspended, effective no sooner than 10 days nor later than 20 days after the date of mailing of notice, by registered letter, to the handler, whenever the market administrator, subject to the limitations set forth in paragraphs (g) and (i) of this section, finds on the basis of available informa-

tion that the handler operating the plant is not meeting the requirements set forth in § 927.26: *Provided*, That, if the handler operating the plant is not a cooperative association qualified pursuant to § 927.81, the market administrator shall also notify any qualified cooperative association which has any members who deliver milk to such plant, and shall notify individually all producers delivering to such plant who are not members of such qualified cooperative association, of such suspension of designation.

(d) In the case of the suspension pursuant to this section of the designation of one or more plants for failure to meet the requirements of § 927.26 (a) or (c), the handler operating such plant may select, prior to the effective date of such suspension, some other pool plant or plants to be substituted for the plant or plants suspended if, during the preceding month, the quantity of milk received from producers at such substituted plant or plants was not less than the quantity of milk received from producers at the suspended plant or plants. The handler may also select the order in which plant designations are to be cancelled in the event of a later determination by the Secretary cancelling the designation of some but not all of the plants suspended.

(e) Not later than 10 days after the effective date of suspension of designation pursuant to this section, the handler operating the plant may apply to the Secretary for a review. If the handler fails to so apply for such review, the designation of the plant as a pool plant shall be cancelled as of the effective date of the suspension. If the handler does so apply, the Secretary shall, after review, either determine that the requirements set forth in § 927.26 have been met and order the suspension revoked, or determine that such requirements have not been met and order the designation cancelled as of the effective date of the suspension. *Provided*, That, if the Secretary has made no determination within two months after the end of the month in which the suspension was made effective, but later orders the designation cancelled, such cancella-

tion shall be effective as of the first of the month following the date of such determination.

(f) Beginning with the effective date of a suspension pursuant to this section, and until the Secretary has either ordered the designation cancelled or ordered the suspension revoked, the plant shall be treated as a pool plant: *Provided,* That all payments into or out of the producer settlement fund (except such payments on the basis of operations during a month in which the plant meets the requirements of § 927.29) shall be held in reserve by the market administrator until an order is issued by the Secretary, but not longer than two months after the end of the month in which the suspension was made effective.

(g) No pool plant designation shall be suspended for failure to meet the requirements of § 927.26 (a) except under the following conditions:

(1) A meeting has been held no sooner than three days after notice by the market administrator to all handlers operating pool plants designated pursuant to § 927.25 or § 927.28 for consideration of the desirable utilization of milk received from producers during a period ending not later than the end of the second month after the month during which such meeting is held.

(2) There has been issued by the market administrator, following such meeting, and mailed to all handlers operating pool plants designated pursuant to § 927.25 or § 927.28, the market administrator's determination of the desirable utilization of milk received from producers each month during all or a part of the period set forth in subparagraph (1) of this paragraph. Such determination shall include a schedule setting forth, by months, the desired minimum percentage of milk received from producers to be utilized in specified classes. Such specified classes shall include Class I-A, and may include all or a part of Class I-B and Class II.

(3) The market administrator finds on the basis of available information that the handler operating a plant or the cooperative reporting a plant is not utilizing milk received

from producers in accordance with the minimum percentage set forth in the determination of the market administrator previously announced pursuant to subparagraph (2) of this paragraph: *Provided*, That the suspension of the pool plant designation of a plant may be made effective during the months of November and December if the market administrator finds that the handler is utilizing any milk received from producers in classes other than those set forth in the determination of the market administrator announced pursuant to subparagraph (2) of this paragraph.

(h) The cancellation of pool plant designations for failure to meet the requirements of § 927.26 (a) shall be subject to the following conditions:

(1) No pool plant designation shall be cancelled if the handler operating the plant utilized the milk received by him at all pool plants from producers during the month in which the suspension is made effective in accordance with the minimum percentage set forth in the determination of the market administrator announced pursuant to paragraph (g) (2) of this section.

(2) No pool plant designation shall be cancelled if the handler operating the plant utilized in the specified classes set forth in the determination of the market administrator announced pursuant to paragraph (g) (2) of this section a percentage of the total milk received by him at all pool plants from producers during the month in which the suspension is made effective which is not less than the percentage of the total milk reported by all handlers to have been received from producers during such month which was reported to have been used in the specified classes.

(3) In the event that all milk received from producers at a plant is reported to the market administrator by a cooperative association qualified pursuant to § 927.81 and such association pays the producers for such milk, the pool plant designation of such plant shall not be cancelled if a percentage of all milk reported by such cooperative as-

sociation is utilized in accordance with the minimum percentage set forth in the determination of the market administrator announced pursuant to paragraph (g) (2) of this section, or in accordance with the percentage set forth in subparagraph (2) of this paragraph.

(4) Cancellation of designation shall be limited to those plants necessary to result in a utilization of milk received at the remaining pool plants operated by the handler, or reported by the cooperative, as the case may be, in accordance with the minimum percentage set forth in the determination of the market administrator announced pursuant to paragraph (g) (2) of this section.

(i) Loss of approval by health authorities of a plant as a source of milk for the marketing area may in itself constitute adequate reason for the market administrator to suspend the designation of plant for failure to meet the requirements of § 927.26 (b), only if the absence of such approval continues for more than 15 days.

§ 927.28 *Plant replacements and change of operator.* (a) A plant may be designated at any time as a pool plant upon application made by the person operating the plant to the Secretary showing that the plant is a replacement for one or more pool plants designated pursuant to § 927.25, or this section, which are operated by him and that substantially all of the dairy farmers delivering milk at the plant previously delivered milk to the pool plant or plants replaced. Upon designation of a plant pursuant to this section, the designation of the plant or plants which is replaced shall be automatically cancelled.

(b) The designation of pool plants pursuant to § 927.25 or this section shall be considered as applicable to the plant as such, and subject to cancellation only pursuant to § 927.27 or this section, regardless of change in the person owning or operating the plant. The market administrator shall be notified, by the handlers involved, of any transfer from one person to another of ownership or operation of a pool plant.

1957 AMENDATORY ORDER

§ 927.29 *Temporary pool plants.* Except for plants which, pursuant to paragraph (a) of § 927.27 or pursuant to the proviso of paragraph (c) or (e) of this section, are not eligible for designation, any plant not designated pursuant to § 927.25 or § 927.28 shall automatically be designated a pool plant in accordance with provisions of paragraphs (a) through (d) of this section.

(a) For any of the months of January through March and July through December, any plant at which 25 percent or more of the receipts of milk from dairy farmers is classified in Class I-A on some [4225] basis other than the failure to account for such milk shall automatically be designated a pool plant for such month.

(b) For any of the months of April, May, or June, any plant at which, during the preceding period of October, November, and December either (1) no milk was received from dairy farmers, or (2) 60 percent or more of the milk received from dairy farmers was classified in Class I-A on some basis other than the failure to account for such milk, shall automatically be designated a pool plant for any of such months of April, May, or June in which 10 percent or more of the milk received from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk.

(c) Any plant which is a pool plant in any of the months of April, May, or June on the basis of paragraph (b) of this section shall be a pool plant in any of the months of July through March following in which 60 percent or more of the milk received at the plant from dairy farmers is classified in Class I-A and Class I-B: *Provided*, That upon written request presented to the market administrator by the handler, the plant shall not be a pool plant on any basis from the month following receipt of such request until the following July 1.

(d) Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraph (a), (b), or (c) of this section (except a plant which is

not a pool plant pursuant to the proviso in paragraph (c)), but from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month at the option of the handler, exercised at the time of filing the report pursuant to § 927.50, if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B: *Provided,* That a plant at which, except for this paragraph, milk received from farmers would be classified and priced under another order issued pursuant to the act, shall not be a pool plant pursuant to this paragraph unless the percentage of the milk received from dairy farms at the plant which is classified in Class I-A is greater than the percentage of such milk which is classified in Class I-B and disposed of in the marketing area defined in such other order.

(e) No plant shall be a pool plant on the basis of this section during the months of January through July if the designation of the plant as a pool plant was cancelled for failure to meet the requirements of § 927.26 during the preceding year.

(f) At the time of announcing the uniform price for each month, the market administrator shall make public the location and name of the operator of any plant for which a report of receipts from dairy farmers was used pursuant to this section in the computation of that uniform price.

CLASSIFICATION

§ 927.30 *Basis of classification.* All milk the butterfat from which is received at a plant at which the classification of milk received from producers is to be determined pursuant to § 927.33, and all milk entering the marketing area in the form of milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, or skim milk, shall be classified in accordance with the form in which it is held at, or moved from, the plant at which classification is determined.

Such classification shall be subject to the conditions set forth in §§ 927.31 through 927.35.

§ 927.31 *Burden of proof.* In establishing the classification of milk received from producers, the burden of proof rests upon the handler who received the milk from producers to show that the milk should not be classified as Class I-A, and that the skim milk in Class II and Class III milk should not be subject to the fluid skim differential. The burden rests upon the handler who receives in the marketing area or at a pool plant, or distributes in the marketing area, milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, or fluid skim milk to establish the source of all of his milk and milk products, and in the absence of such proof such milk and the milk equivalent of such enumerated products shall be subject to the provisions of § 927.84.

§ 927.32 *Period for establishing classification.* A period ending with the last day of the month following the month during which the milk was received from dairy farmers shall be allowed for handling such milk as a basis for establishing the classification as other than Class I-A: *Provided,* That the holding of milk in the form of cream in a licensed cold storage warehouse for at least 7 days shall constitute that portion of the handling of such cream required pursuant to § 927.37 (d) (2) that is required to be performed during the month following its receipt from dairy farmers.

§ 927.33 *Plant at which classification is to be determined.* Classification shall be determined at the plant at which milk is received from dairy farmers: *Provided,* That if such milk is shipped in the form of milk or cream to another plant or other plants, it shall be classified subject to the provisions of paragraphs (a) and (b) of this section, at the plant or plants to which it is shipped, and there shall be no limit on the number of interplant movements in the form of milk or cream except as set forth in paragraphs (a) and (b) of this section.

(a) Except as set forth in paragraph (b) of this section, the classification of milk shipped in the form of milk and of milk the butterfat from which is shipped in the form of cream to a non pool plant shall be determined at the non pool plant (unless such non pool plant is in the marketing area, received no milk from dairy farmers and is engaged substantially either in distributing packaged milk or cream in the marketing area or in shipping bulk milk or cream to a pasteurizing and bottling plant in the marketing area), unless the handler operating the pool plant from which such shipments are made to the non pool plant elects in writing on his monthly reports to have classification of all milk or cream received during the month at such handler's pool plant and shipped as milk or cream to the non pool plant determined at the pool plant from which the milk or cream is shipped to the non pool plant.

(b) The classification of milk shipped in the form of milk more than 65 miles from the plant where received from dairy farmers and of milk the butterfat from which is shipped in the form of cream more than 65 miles from the plant where the milk was separated to a plant outside Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York State, Ohio, Pennsylvania, New Jersey, Delaware, Maryland, Virginia, West Virginia, or the District of Columbia shall be determined at the plant from which the milk or cream is so shipped.

§ 927.34 *Plant loss.* Allowances for plant loss not to exceed 5 percent of the butterfat in the product resulting from any specific plant operation, which plant loss may be classified the same as the milk equivalent of the butterfat in the product, shall be determined by the market administrator pursuant to § 927.36.

§ 927.35 *Accounting procedure.* The accounting procedure for classifying milk pursuant to §§ 927.30 through 927.37 shall be set up by the market administrator pursuant to § 927.36. Such accounting procedure shall include conversion factors to be used in the absence of specific weights and tests, specific definitions of products, and such methods

for assignment of milk to classes according to source and form as may be necessary to effectuate the provisions of §§ 927.30 through 927.37 and which are not inconsistent with the following general principles:

(a) Milk, concentrated fluid milk, fluid milk products, cream, half and half, fluid cream products, and skim milk received from pool plants or from producers shall be assigned, as far as possible, to Class I-A, Class II, or to skim milk subject to the fluid skim milk differential. The assignment of milk shall be subject to the additional requirements set forth in subparagraphs (1) through (5) of this paragraph.

(1) If the plant is not a pool plant pursuant to § 927.25 or § 927.28, milk received directly from dairy farmers in an amount sufficient to qualify such plant as a pool plant pursuant to paragraph (a) or (b) of § 927.29 shall be assigned to Class I-A milk leaving the plant which is distributed to outlets which are not other plants: *Provided*, That if such Class I-A milk is not sufficient to qualify such plant as a pool plant pursuant to paragraph (a) or (b) of § 927.29, no assignment pursuant to this subparagraph is to be made by the handler.

(2) After any required assignment pursuant to subparagraph (1) of this paragraph, milk from the following sources shall be assigned as far as possible to Class I-A:

(i) Milk received from producers delivering to the plant if the plant is designated as a pool plant pursuant to § 927.25 or § 927.28.

[4226] (ii) The balance of the milk received from producers if the plant is a pool plant pursuant to § 927.29 on the basis of the assignment pursuant to subparagraph (1) of this paragraph.

(iii) Milk received from other pool plants designated pursuant to § 927.25 or § 927.28.

(iv) Milk received from other plants which are pool plants pursuant to § 927.29 on the basis of the assignment

pursuant to subparagraph (1) of this paragraph at such other plants.

(3) After assignments pursuant to subparagraphs (1) and (2) of this paragraph, milk from other sources shall be assigned to remaining Class I-A at the option of the handler.

(4) Notwithstanding the other provisions of this paragraph, milk received from the plant of a handler at which milk is received from farms which is eliminated from the computation of the handler's net pool obligation pursuant to § 927.65 (h) (1) shall be assigned, as far as possible, to Class III milk at the plant unless such assignment results in nonpooled milk being assigned to Class I-A, Class II, or skim milk subject to the fluid skim differential.

(5) Notwithstanding other provisions of this paragraph, milk received (except packaged milk produced in accordance with methods and standards of the American Association of Medical Milk Commissions for the production of certified milk) from a handler's plant receiving milk which, pursuant to § 927.65 (h) (2) or (3), is excluded from such handler's net pool obligation shall be considered to be nonpool milk with respect to assignments pursuant to this section and payments pursuant to § 927.83.

(b) After the assignments prescribed in paragraph (a) of this section, the remaining whole milk received at a plant from producers or from pool plants and in like form from dairy farmers not producers or from nonpooled plants shall be assigned pro rata to the total classification of all milk on hand at or leaving such plant as whole milk.

(c) After the assignments prescribed in paragraphs (a) and (b) of this section, the then remaining milk or cream received from producers or from pool plants and the milk or cream received from dairy farmers not producers or from nonpool plants shall be assigned pro rata to the total remaining classification of such products received in like form.

(d) After the assignment of skim milk prescribed in

paragraph (a) of this section, skim milk received from nonpool plants shall be assigned to the remaining skim milk subject to the fluid skim differential.

(e) Milk from a handler's own farm which is excluded from the computation of the handler's net pool obligation pursuant to § 927.65 (h) (2) shall be assigned pro rata to the classification of milk at the plant after first assigning all milk from other pool plants to Class I-A: *Provided,* That any milk shipped to another plant on which the handler operating the other plant is required to make payments pursuant to § 927.83 shall be considered to be Class III at this plant, and shall be considered to be subject to the butter-cheese adjustments if such butter-cheese adjustment was used in determining the rate of payment pursuant to § 927.83.

§ 927.36 *Rules and regulations.* The rules and regulations to effectuate the terms and provisions of §§ 927.30 through 927.37 shall be made, and may from time to time be amended, by the market administrator in accordance with the procedure set forth in this section: *Provided,* That at any time upon a determination by the Secretary that an emergency exists which requires the immediate adoption of rules and regulations, the market administrator may issue, with the approval of the Secretary, temporary rules and regulations without regard to the following procedure: *Provided further,* That if any interested person makes written request for the issuance, amendment, or repeal of any rule, the market administrator shall within 30 days either issue notice of meeting pursuant to paragraph (a) of this section or deny such request, and except in affirming a prior denial, or where the denial is self-explanatory, shall state the grounds for such denial.

(a) All proposed rules and regulations and amendments thereto shall be the subject of a meeting called by the market administrator, at which time all interested persons shall have opportunity to be heard. Notice of such meeting shall be given by the market administrator, and a copy of

the proposed rules and regulations shall be sent at least five days prior to the date of the meeting to all handlers operating pool plants. A stenographic record shall be made at all such meetings and such record shall be public information available for inspection at the office of the market administrator.

(b) A period of at least five days after the meeting held pursuant to paragraph (a) of this section shall be allowed for the filing of briefs. Such briefs shall be public information available for inspection at the office of the market administrator.

(c) Not later than 30 days after a meeting held pursuant to paragraph (a) of this section, the market administrator shall issue and send to all handlers operating pool plants the tentative rules and regulations or amendments thereto relating to the issues considered at such meeting, or a tentative notice that no rules or regulations or amendments thereto are to be issued prior to further consideration at another meeting. The tentative rules and regulations, or tentative notice, together with copies of the stenographic record and briefs, shall also at the same time be forwarded by the market administrator to the Secretary.

(d) Not later than 30 days after issuance by the market administrator, the Secretary shall either approve the tentative rules and regulations or tentative notice as issued, or direct the market administrator to reconsider. In which latter event, the market administrator shall within 30 days either issue revised tentative rules and regulations or tentative notice, or call another meeting pursuant to paragraph (a) of this section.

(e) The tentative rules and regulations and amendments thereto or tentative notice issued pursuant to paragraph (c) of this section shall be effective as of the first of the month following approval by the Secretary, but not sooner than ten days after issuance by the market administrator.

§ 927.37 *Classes of utilization.* Subject to all of the conditions set forth in §§ 927.30 through 927.36, milk shall be

classified at the plant at which classification is to be determined as follows:

(a) Class I-A milk shall be all milk except as provided in paragraph (b) of this section and in subparagraphs (3) and (5) of paragraph (d) of this section, the butterfat from which leaves or is on hand at the plant in the form of milk, concentrated fluid milk, fluid milk products, or as cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, and all milk the classification of which is not established in some other class named in this section.

(b) Class I-B milk shall be all milk, except as provided in subparagraphs (3) and (5) of paragraph (d) of this section, the butterfat from which leaves the plant in the form of milk, concentrated fluid milk, fluid milk products, or of cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, and which is delivered to a plant or a purchaser outside the marketing area and remains outside the marketing area.

(c) Class II milk shall be all milk the butterfat from which leaves or is on hand at the plant in the form of cream, sweet or sour, half and half, fluid cream products, or in the form of cultured or flavored milk drinks, containing less than 3.0 percent or more than 5.0 percent of butterfat, unless such cream, half and half, fluid cream products, or cultured or flavored milk drinks are established to have been so handled or marketed as to classify such milk in some other class named in this section.

(d) Class III milk shall be all milk which meets the conditions set forth in any one of the following subparagraphs:

(1) All milk the butterfat from which leaves or is on hand at the plant in the form of cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat or in the form of cream, half and half, or fluid cream products which cream, half and half, fluid cream products, or cultured or flavored milk drinks is delivered to a plant or a purchaser outside the New York

metropolitan district and remains outside the New York metropolitan district.

(2) All milk the butterfat from which leaves or is on hand at the plant in the form of cream which is subsequently held in a licensed cold storage warehouse for at least 28 days, and which is subject at all times until utilization of such cream to being inspected by a representative of the market administrator to determine the physical presence of the cream. After the first 7 days, such cream may be moved from one licensed cold storage [4227] warehouse to another: *Provided*, That the market administrator receives notice of such removal within 7 days thereafter. Any handler whose report claimed the original classification of milk pursuant to this subparagraph shall be liable under the provisions of § 927.80 for the difference between the Class II and Class III prices for the month in which the Class III classification was claimed on any such milk if the storage of cream does not comply with all requirements of this subparagraph.

(3) All milk the butterfat from which leaves the plant in the form of products named in paragraph (a), (b), or (c) of this section if such products have been sterilized and leave the plant in hermetically sealed containers.

(4) All milk the butterfat from which leaves the plant in the form of milk which is delivered in bulk to an establishment (other than a plant as defined in § 927.8) at which food products are processed and packed in hermetically sealed containers and at which establishment there is no disposition of milk or milk products specified in paragraphs (a), (b), or (c) of this section other than milk or milk products received in consumer packages for consumption on the premises.

(5) All milk the butterfat from which leaves or is on hand at the plant in the form of concentrated fluid milk which is established not to have been packaged in consumer packages either before or after leaving the plant.

(6) All milk the butterfat from which leaves or is on hand at the plant in the form of some product the classifica-

tion of which is not established in some other class named in this section.

MINIMUM PRICES

§ 927.40 *Class prices.* For milk received during each month from producers or cooperative associations of producers, each handler shall pay per hundredweight not less than the prices set forth in this section, subject to the differentials and adjustments in § § 927.41 through 927.44. Any handler who purchases or receives, during any month, milk from a cooperative association of producers which is also a handler shall, on or before the 15th day of the following month, pay such cooperative association in full for such milk at not less than the minimum class prices applicable pursuant to this section, subject to the differentials and adjustments in § § 927.41 through 927.44 and § 927.71 (c).

(a) For Class I-A milk the price during each month shall be a price computed pursuant to subparagraphs (1) through (11) of this paragraph: *Provided*, That the provisions in effect for the pricing of Class I-A milk for the month immediately prior to the effective date of the proviso shall continue in effect for the purpose of computing Class I-A prices for the first two months following the effective date of this proviso.

(1) Divide (with the result expressed to three decimal places) the monthly wholesale price index for all commodities in the second preceding month as reported on a 1947-49 base by the Bureau of Labor Statistics, United States Department of Labor, by the average of the monthly indexes reported on the same base for the year 1955.

(2) Multiply the base price of $5.20 by the result determined pursuant to subparagraph (1) of this paragraph. Express the result to the nearest cent.

(3) For each month during the 3-year period ending with the second preceding month, calculate to one decimal place the percentage that the total volume of milk in Class I-A and Class I-B was of the total volume of reported

receipts of milk from producers and from unrevealed sources (these percentages to be referred to as utilization percentages): *Provided,* That the utilization percentages for months prior to the effective date of the amendment to the definition of the marketing area set forth in § 927.3 to include areas outside the New York metropolitan district shall be the percentages computed pursuant to this subparagraph plus 8.1.

(4) Calculate the average of the 36 monthly utilization percentages for the 3-year period ending with the second preceding month.

(5) Calculate the average of the 6 utilization percentages for the second and third preceding months and for the same months of the 2 preceding years.

(6) Divide the result determined pursuant to subparagraph (5) of this paragraph by the result determined pursuant to subparagraph (4) of this paragraph expressing the result to three decimal places.

(7) Calculate the average of the 2 utilization percentages in the second and third preceding months.

(8) Divide the result determined pursuant to subparagraph (7) of this paragraph by the result determined pursuant to subparagraph (6) of this paragraph. Express the result to one decimal place and add 100.

(9) Calculate a utilization adjustment percentage by subtracting the base utilization percentage of 56.2 from the result determined pursuant to subparagraph (8) of this paragraph.

(10) Multiply the result determined pursuant to subparagraph (2) of this paragraph by the utilization adjustment percentage determined pursuant to subparagraph (9) of this paragraph.

(11) Multiply the result determined pursuant to subparagraph (10) of this paragraph by the following seasonal adjustment factor for the month for which the Class I-A price is being determined:

| | | | |
|---|---|---|---|
| January | 1.05 | July | 0.95 |
| February | 1.03 | August | 1.00 |
| March | 1.00 | September | 1.04 |
| April | 0.94 | October | 1.07 |
| May | 0.88 | November | 1.09 |
| June | 0.88 | December | 1.07 |

(b) Whenever any of the following conditions exist for 3 consecutive months, the Secretary shall call a public hearing promptly to consider those and other economic conditions, or promptly announce his determination that such a hearing should not be held, together with reasons for such determination:

(1) There is a difference of more than 6 points for each of 3 consecutive months between the index of the cost of production announced pursuant to § 927.46 (a) (6) and the index of wholesale prices (1955 base) announced pursuant to § 927.46 (a) (1).

(2) There is a difference of more than 15 points for each of 3 consecutive months between the index of the cost of production announced pursuant to § 927.46 (a) (6) and the index of the Class I-A price announced pursuant to § 927.46 (a) (7).

(3) The Class I-A price for each of 3 consecutive months is less than $1.00 higher than the condensery price announced pursuant to § 927.46 (b) (9) for such months or more than $2.50 higher than such condensery price.

(c) For Class I-B milk the price shall be the price for Class I-A milk.

(d) For Class II milk the price during each month shall be the sum of the amounts computed pursuant to subparagraphs (1) and (2) of this paragraph.

(1)

| U. S. Grade A or U. S. 92-score butter, wholesale, at New York, average price announced pursuant to § 927.46 (a) (4) for the period ending on the 24th of the preceding month | Class II price: March through July (dollars per hundredweight) | Class II price: August through February (dollars per hundredweight) |
|---|---|---|
| *Cents per pound* | | |
| Under 21.5 | 1.35 | 1.50 |
| 21.5 or over, but under 25.0 | 1.50 | 1.65 |
| 25.0 or over, but under 28.5 | 1.65 | 1.80 |
| 28.5 or over, but under 32.0 | 1.80 | 1.95 |
| 32.0 or over, but under 35.5 | 1.95 | 2.10 |
| 35.5 or over, but under 39.0 | 2.10 | 2.25 |
| 39.0 or over, but under 42.5 | 2.25 | 2.40 |
| 42.5 or over, but under 46.0 | 2.40 | 2.55 |
| 46.0 or over, but under 49.5 | 2.55 | 2.70 |
| 49.5 or over, but under 53.0 | 2.70 | 2.85 |
| 53.0 or over, but under 56.5 | 2.85 | 3.00 |
| 56.5 or over, but under 60.0 | 3.00 | 3.15 |
| 60.0 or over, but under 63.5 | 3.15 | 3.30 |
| 63.5 or over, but under 67.0 | 3.30 | 3.45 |
| 67.0 or over, but under 70.5 | 3.45 | 3.60 |
| 70.5 or over, but under 74.0 | 3.60 | 3.75 |
| 74.0 or over, but under 77.5 | 3.75 | 3.90 |
| 77.5 or over, but under 81.0 | 3.90 | 4.05 |

Should the average butter price set forth above be 81.0 cents or more, the Class II price shall be the price which would result from further extension of this table at the same rate to cover such average butter price.

(2) Multiply by 7.5 the average of all the hot roller process dry skim milk or nonfat dry milk solids quotations for "other brands, human consumption, carlots, bags, or barrels" (using midpoint of any range as one quotation), published for the delivery period in "The Producers' Price-Current," and subtract 48 cents.

(e) For Class III milk, the price shall be the sum of the amounts computed or determined pursuant to subparagraphs (1), (2), and (3) of this paragraph, minus 80 cents.

(1) To the simple average of the daily wholesale selling price per pound (using the midpoint of any price range as one price) reported during such month by the [4228] United States Department of Agriculture for Grade A

(92-score) bulk creamery butter in the New York City market, add two cents, multiply by 1.22, and then multiply by 3.5: *Provided,* That for any of the months from August through February for which the utilization adjustment percentage announced pursuant to § 927.46 (a) (2) is 107.5 or larger, there shall be an additional three cents added to such average butter price.

(2) Multiply by 7.8 the weighted average, as computed by the market administrator using a weight of 70 for roller process prices and a weight of 30 for spray process prices, of the prices per pound of roller process and spray process nonfat dry milk solids, for human consumption in carlots, f.o.b. manufacturing plants in the Chicago area, as published by the United States Department of Agriculture for the period from the 26th day of the immediately preceding month through the 25th day of the current month.

(3) Determine the appropriate seasonal adjustment in accordance with the following table:

| Month to which the price is applicable: | *Amount* |
|---|---|
| July through November | $0.13 |
| December through February | 0.10 |
| March and April | 0.08 |
| May and June | 0.05 |

§ 927.41 *Butterfat differentials.* The minimum price for Class I-A and Class I-B milk shall be plus or minus four cents for each one-tenth of 1 percent of butterfat therein above or below 3.5 percent. The minimum price for Class II and Class III milk shall be plus or minus, for each one-tenth of 1 percent of butterfat therein above or below 3.5 percent, an amount computed as follows: subtract from the respective class prices an amount computed pursuant to § 927.40 (d)(2), and divide by 35.

§ 927.42 *Transportation differentials.* The market administrator shall determine and publicly announce a freight zone for each pool plant, and he shall determine the freight zone for each plant at which milk or milk products subject

to the provisions of §§ 927.83 and 927.84 is received from dairy farmers or is first found. Such freight zone shall be the shortest highway mileage from the plant to the nearest of the following points as computed by the market administrator from data contained in Mileage Guide No. 5, without supplements, issued on July 20, 1949, effective August 21, 1949, by the Household Goods Carriers' Bureau, Agent, Washington, D. C.: Mount Vernon or Yonkers in the State of New York; Tenafly, Glen Ridge, East Orange, Elizabeth, Hackensack, Hillside, Irvington, or Passaic in the State of New Jersey. The freight zone for plants located in New York City, Nassau, and Suffolk Counties in the State of New York, or in Essex, Hudson, and Union Counties in the State of New Jersey shall be in the 1-10 mile zone. The class prices set forth in § 927.40 and the fluid skim differential set forth in § 927.44 shall be plus or minus the amount set forth in the following schedule:

| A | B | C |
|---|---|---|
| Freight zone—Miles | Classes I-A, I-B, and skim milk subject to the fluid skim differential | Classes II and III |
| | *Cents per hundredweight* | *Cents per hundredweight* |
| 1-10 | +28 | +8 |
| 11-20 | +26.6 | +8 |
| 21-25 | +25.2 | +8 |
| 26-30 | +25.2 | +7 |
| 31-40 | +23.8 | +7 |
| 41-50 | +22.4 | +7 |
| 51-60 | +21.0 | +6 |
| 61-70 | +19.6 | +6 |
| 71-75 | +18.2 | +6 |
| 76-80 | +18.2 | +5 |
| 81-90 | +16.8 | +5 |
| 91-100 | +15.4 | +5 |
| 101-110 | +14.0 | +4 |
| 111-120 | +12.6 | +4 |
| 121-125 | +11.2 | +4 |
| 126-130 | +11.2 | +3 |
| 131-140 | +9.8 | +3 |
| 141-150 | +8.4 | +3 |
| 151-160 | +7.0 | +2 |
| 161-170 | +5.6 | +2 |
| 171-175 | +4.2 | +2 |
| 176-180 | +4.2 | +1 |
| 181-190 | +2.8 | +1 |
| 191-200 | +1.4 | +1 |
| 201-210 | 0.0 | 0 |
| 211-220 | −1.4 | 0 |
| 221-225 | −2.8 | 0 |
| 226-230 | −2.8 | −1 |
| 231-240 | −4.2 | −1 |
| 241-250 | −5.6 | −1 |
| 251-260 | −7.0 | −2 |
| 261-270 | −8.4 | −2 |
| 271-275 | −9.8 | −2 |
| 276-280 | −9.8 | −3 |
| 281-290 | −11.2 | −3 |
| 291-300 | −12.6 | −3 |
| 301-310 | −14.0 | −4 |
| 311-320 | −15.4 | −4 |
| 321-325 | −16.8 | −4 |
| 326-330 | −16.8 | −5 |
| 331-340 | −18.2 | −5 |
| 341-350 | −19.6 | −5 |
| 351-360 | −21.0 | −6 |
| 361-370 | −22.4 | −6 |
| 371-375 | −23.8 | −6 |
| 376-380 | −23.8 | −7 |
| 381-390 | −25.2 | −7 |
| 391-400 | −26.6 | −7 |
| 401 and over | −28.0 | −8 |

§ 927.43 *Butter-cheese adjustment.* For milk received from producers which is classified as Class III pursuant to § 927.37 (d) (6), and which leaves or is on hand at the plant at which classification is determined in the form of butter or Cheddar, American Cheddar, Colby, washed curd, or part skim Cheddar cheese, or is assigned to plant loss which pursuant to § 927.34 is associated with such products, there shall be credited to the handler receiving the milk from producers four cents per pound of butterfat in such milk in the months of March through June and three cents per pound of butterfat in such milk in the months of July through February: *Provided,* That for milk received from producers during any of the months of March through July which is classified on the basis of one of the types of cheese named in this section, the amount so credited shall be increased one cent per pound of butterfat for each full five-hundredths by which the ratio of 2.5 is lower than a ratio computed as follows; add to the New York 92-score butter price for the month announced pursuant to § 927.46 (b) (5) the amount obtained by multiplying by 1.83 the weighted nonfat dry milk solids price for the period ending with the 25th day of the month as announced pursuant to § 927.46 (b) (7); divide this sum by the price of Cheddar cheese for the month as announced pursuant to § 927.46 (b) (8) and round the result to the nearest hundredth: *Provided further,* That for such milk received from producers at a plant in a freight zone farther from New York City than the 321-325 mile zone, there shall be deducted from the amount so credited the following amounts per hundredweight of milk:

| Zones of plant: | *Cents per hundredweight* |
|---|---|
| 326-350 | 1 |
| 351-375 | 2 |
| 376-400 | 3 |
| 401 and over | 4 |

With respect to each plant at which milk received from producers is reported by the handler operating the plant to have been utilized (either at the plant where received or at another plant), in an amount exceeding an average of 4,000 pounds per day in the manufacture of butter or of Cheddar, American Cheddar, Colby, washed curd, or part skim Cheddar cheese, the market administrator shall publicly disclose (a) the location of the plant at which the milk was received from producers, and (b) the name of the handler operating such plant. Such public disclosure shall be made monthly on the basis of handlers' monthly reports, and may be made more frequently on the basis of such other utilization reports as may be required by the market administrator.

§ 927.44 *Fluid skim differential.* For skim milk derived from Class II or Class III milk which skim milk enters the marketing area in the form of milk, fluid skim milk, condensed skim milk, half and half, cream, or cultured milk drinks and is there utilized or disposed of in the form of milk, fluid skim milk, half and half, or cultured milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, and for all other skim milk derived from Class II or Class III milk which is not established to have been otherwise utilized or disposed of, the handler shall pay a fluid skim differential per hundred-weight computed as follows: deduct the price of Class II milk computed pursuant to § 927.40 (d) from the price for Class I-A milk computed pursuant to § 927.40 (a), and divide by 0.9125: *Provided*, That with respect to skim milk so utilized or disposed of in half and half, this differential shall apply only to that quantity of skim milk in excess of 4.5 times the quantity of butterfat in such half and half.

§ 927.45 *Use of equivalent price or index.* If for any reason a price or index specified in §§ 927.40 through 927.46 for use in computing and announcing class prices or for any other purpose is not reported or published in the manner therein described, the market administrator shall use

a price or index determined by the Secretary to be equivalent to or comparable with the price or index specified.

§ 927.46 *Announcement of prices.* The market administrator shall publicly announce the following:

[4229] (a) Not later than the 25th day of each month, or the next succeeding workday in any month in which the 25th day is a Sunday or holiday:

(1) The monthly wholesale price index for all commodities in the preceding month as reported on a 1947-49 base by the Bureau of Labor Statistics, United States Department of Labor, and the resulting index determined pursuant to § 927.40 (a) (1) multiplied by 100.

(2) The utilization adjustment percentage computed pursuant to § 927.40 (a) for the following month.

(3) The preliminary Class I-A price computed pursuant to § 927.40 (a) for the following month.

(4) The average, for the period beginning with the 25th of the immediately preceding month and ending with the 24th of the current month of the highest prices reported daily by the United States Department of Agriculture for U. S. Grade A or U. S. 92-score butter at wholesale in the New York market.

(5) The preliminary calculation for the following month pursuant to § 927.40 (d) (1).

(6) The index of the cost of production for the preceding month computed by the market administrator as follows:

The index of the cost of production computed by the New York State College of Agriculture at Cornell University (1910-14 base) converted to a 1955 base.

(7) The index computed by dividing the Class I-A formula price prior to the seasonal adjustment, for the following month by $5.20.

(8) Other statistics relating to economic conditions affecting the market supply and demand for milk.

(b) Not later than the 5th day of each month, or the next succeeding workday in any month in which the 5th day is a Sunday or holiday, for the preceding months:

(1) The minimum class prices pursuant to § 927.40.

(2) The butterfat differentials pursuant to § 927.41.

(3) The butter and cheese adjustment pursuant to § 927.43.

(4) The fluid skim differential pursuant to § 927.44.

(5) The simple average of the daily wholesale selling prices per pound (using the midpoint of any price range as one price) reported by the United States Department of Agriculture for Grade A or 92-score bulk creamery butter in New York City.

(6) The average of the prices (using the midpoint of any range as one quotation) reported daily in "The Producers' Price-Current" for hot roller process dry skim milk or nonfat dry milk solids "other brands, human consumption, carlots, bags, or barrels."

(7) The respective averages of the carlot prices per pound of spray process and of roller process nonfat dry milk solids for human consumption, f. o. b. manufacturing plants in the Chicago area, as published for the period from the 26th day of the second preceding month through the 25th of the preceding month by the United States Department of Agriculture, and the weighted average of such two averages using a weight of 70 for roller prices and a weight of 30 for spray prices.

(8) The average selling prices per pound reported by the United States Department of Agriculture for Wisconsin State Brand Cheddars, cars or truckloads, f. o. b. Wisconsin assembly points.

(9) The average of prices paid in the preceding month by 18 midwestern condenseries as reported by the United States Department of Agriculture.

(10) The nearby differential rate for the preceding month determined pursuant to § 927.71 (b).

## 1957 AMENDATORY ORDER

### REPORTS OF HANDLERS

§ 927.50 *Monthly reports.* On or before the 10th day of each month, each handler shall report to the market administrator, for the preceding month, in the manner and on forms prescribed by the market administrator, with respect to milk or milk products received at each of his pool plants, and at each of his plants where milk or milk products subjected to payments under § § 927.83 and 927.84 were handled, the following: *Provided,* That for informational and statistical purposes only, each handler, by not later than the 10th day after the effective date of this proviso, shall report to the market administrator, for the preceding month, in the manner and on forms prescribed by the market administrator, the information specified in paragraphs (a) through (e) of this section with respect to plants which become pool plants on the effective date of this proviso but which were not pool plants in the preceding month:

(a) The total quantity of milk and of each milk product with the average butterfat content thereof, received from dairy farmers, from other plants, from such handler's own farm, from other handlers, and from other sources;

(b) The total quantity of milk and of each milk product moved out of, or on hand at, such plant, the average butterfat content thereof, and the destination of any milk or milk product the classification of which wholly or partially depends upon its destination, moved out of such plant;

(c) The disposition of milk or milk products at each other plant at which the disposition of any milk or milk products is claimed as the basis of classification;

(d) The computation pursuant to § 927.65 of such handler's net pool obligation;

(e) The computation of the amount of any payments pursuant to § § 927.83 and 927.84; and

(f) Beginning March 1958, the total quantity of base milk and the total quantity of excess milk delivered by dairy farmers.

§ 927.51 *Producer payroll reports.* Each handler shall report with respect to producers as follows:

(a) On or before the 10th day after the end of each month, the information required by the market administrator with respect to producer additions, producer withdrawals, and changes in names of farm operators; and

(b) On or before the last day of each month, such handler's producer payroll for the preceding month, which shall show for each producer:

(1) The total delivery of milk with the average butterfat test thereof: *Provided*, That, if no butterfat tests are made on any of the milk received from producers, and if such milk is received by the handler from no more than 10 producers, 3.5 percent shall be reported as the average butterfat test of milk received from producers,

(2) The amount of payment due each producer,

(3) Any deductions and charges made by the handler,

(4) The net amount of payment to such producer made pursuant to § § 927.70 through 927.72, and

(5) Such other information with respect thereto as the market administrator may require.

§ 927.52 *Storage cream reports.* (a) On or before the last day of the period for establishing classification pursuant to § 927.32, or, if earlier, not later than 15 days prior to the date of final removal of the cream from storage, each handler who separates milk the cream from which is stored as a basis for Class III classification pursuant to § 927.37 (d) (2) shall report to the market administrator on forms prescribed by the market administrator information with respect to the storage of cream. Failure to make such report shall result in the disallowance of Class III classification pursuant to § 927.37 (d) (2).

(b) The handler who made such reports shall report to the market administrator, not later than the end of the second month following the month during which frozen cream is utilized, information with respect to the utiliza-

tion of such cream. Failure to make such reports shall result in the disallowance of storage cream payments pursuant to § 927.82 (b).

(c) With respect to notices of transfer of cream filed pursuant to § 927.37 (d) (2) and with respect to storage cream reports filed pursuant to this section, a receipt form acknowledging receipt of such notice or report shall be mailed by the market administrator to the handler within 48 hours after such notice or report is received by the market administrator.

§ 927.53 *Other reports.* At such time as the market administrator may request, each handler shall report to the market administrator in the manner and on forms prescribed by the market administrator:

(a) The total quantity of milk and of each milk product received at his nonpool plants, with the average butterfat content thereof, from dairy farmers, from other plants, from such handler's own farm, from other handlers, and from other sources;

(b) The total quantity of milk and of each milk product moved out of, or on hand at, his nonpool plants, the average butterfat content thereof, and the destination of any milk or milk product moved out of such plants;

(c) Information concerning land, buildings, surroundings, facilities, and equipment at any of his plants;

[4230] (d) The current receipts and utilization of milk at each of his pool plants; and

(e) Such other information as may be necessary for the administration of the provisions of this part.

§ 927.54 *Verification of reports and payments.* The market administrator shall promptly verify all reports and payments of each handler by audit of such handler's records and of the records of any handler or person upon whose disposition of milk such handler claims classification, and each such handler shall, during the usual hours of business, make available to the market administrator

or his representative such records and facilities, of his own or other persons, as will enable the market administrator to:

(a) Verify the receipts and disposition of all milk required to be reported pursuant to §§ 927.50 through 927.53, and, in case of errors or omissions, ascertain the correct figures;

(b) Weight, sample, and test for butterfat content the milk received from producers and any product of milk upon which classification depends;

(c) Verify the payments to producers prescribed in §§ 927.70 through 927.72;

(d) Verify all claims for payments pursuant to §§ 927.81 and 927.82; and

(e) Make inspection of buildings and their surroundings, facilities, and equipment for verification purposes and to ascertain what constitutes a plant.

§ 927.55 *Retention of records.* All books and records required under this subpart to be made available to the market administrator shall be retained by the handler for a period of three years to begin at the end of the calendar month to which such books and records pertain: *Provided*, That if, within such three-year period, the market administrator notifies the handler in writing that the retention of such books and records, or of specified books and records, is necessary in connection with a proceeding under section 8c (15) (A) of the act or a court action specified in such notice, the handler shall retain such books and records, or specified books and records, until further written notification from the market administrator. In either case the market administrator shall give further written notification to the handler promptly upon the termination of the litigation or when the records are no longer necessary in connection therewith.

BASE RATING PLAN

§ 927.60 *Computation of producer's base.* (a) Subject to the rules set forth in § 927.61, the market administrator each year shall compute a daily base for each producer as follows: determine the total amount of milk delivered by the producer in the months of July through November and divide by 153. Such base shall be applicable for the 12-month period beginning the following March.

(b) The monthly base for any producer shall be the daily base multiplied by the number of days in the month, except that for any producer who discontinues delivering to a pool plant during a month, the monthly base shall be the daily base multiplied by the number of days in the month prior to the discontinuance of delivery, and for any producer who begins delivering to a pool plant in a month, the monthly base at such plant shall be the daily base multiplied by the number of days remaining in the month beginning with the day of first delivery.

§ 927.61 *Base rules.* No later than March 1 of each year, the market administrator shall inform each handler of the daily base for each of his producers delivering milk to his pool plants; and not later than 15 days after receiving such information, handlers shall inform each producer of his base.

DETERMINATION OF UNIFORM PRICE

§ 927.65 *Net pool obligation of handlers.* The handler's net pool obligation shall be computed pursuant to paragraphs (a) through (g) of this section: *Provided,* That milk specified in paragraph (h) of this section shall be eliminated from this computation and such milk shall be deemed to be excluded by the phrase "milk received from producers" as such phrase is used in this section and in §§ 927.43, 927.66, 927.79, 927.81, 927.82, and 927.90.

(a) Determine the classification pursuant to §§ 927.30 through 927.37 of milk received from producers at each pool plant;

(b) Subject to adjustments for appropriate differentials pursuant to §§ 927.41 and 927.42, multiply the milk in each class by the class price, multiply the skim milk subject to the fluid skim differential by the fluid skim differential, and add together the resulting values;

(c) Deduct, in the case of each plant where the average butterfat content of all milk received from producers is in excess of 3.5 percent, and add, in the case of each plant where the butterfat content of all milk received from producers is less than 3.5 percent, the total value of the butterfat differential applicable pursuant to § 927.72;

(d) Deduct, in the case of each plant nearer New York City than the 201-210 mile zone, and add, in the case of each plant farther from New York City than the 201-210 mile zone, the sum obtained by multiplying the milk received from producers by the zone differential set forth in column B of the schedule in § 927.42 applicable to the plant;

(e) Deduct the total amount of the butter-cheese adjustment computed pursuant to § 927.43;

(f) Deduct the total value of the nearby differential to be paid producers pursuant to § 927.71 (b). The computation to this point shall be known as the handler's net pool obligation;

(g) Add together the handler's net pool obligation for all plants at which milk was received from producers; and

(h) Milk specified in subparagraphs (1) through (3) of this paragraph shall be excluded from the computation of the handler's net pool obligation pursuant to this section.

(1) Milk received from farms in Nassau and Suffolk Counties in New York, which farms are not approved for sale of milk in New York City and milk received from farms in New York City.

(2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.

(3) All milk received at a handler's plant from such

handler's own farm in the event that no milk is received from any other source at such plant.

§ 927.66 *Computation of the uniform price.* The market administrator shall, on or before the 14th day of each month, audit for mathematical correctness and obvious errors the report submitted for the preceding month by each handler. If the unreserved cash balance in the producer settlement fund to be included in the computation is less than two cents per hundredweight of milk received from producers on all reports, the report of any handler who has not made payment of the last monthly pool debit account rendered pursuant to § 927.76 shall not be included in the computation of the uniform price. The report of such handler shall not be included in the computation for succeeding months until he has made full payment of outstanding monthly pool debits. Subject to the aforementioned conditions, the market administrator shall compute the uniform price in the following manner:

(a) Combine into one total the net pool obligations of all handlers;

(b) Subtract the total of payments required to be made for such month by § 927.81;

(c) Add the total payments required to be made by handlers for such month pursuant to §§ 927.83 and 927.84;

(d) Add the amount of unreserved cash in the producer settlement fund;

(e) Subtract an amount equal to not less than eight cents nor more than nine cents per hundredweight of milk received from producers to provide against the contingency of errors in reports and payments or of delinquencies in payments by handlers; and

(f) Divide the result obtained in paragraph (e) by the total pounds of milk delivered by producers. The result shall be known as the uniform price for milk containing 3.5 percent butterfat received from producers at plants in the 201-210 mile zone.

§ 927.67 *Announcement of uniform price and weighted average butterfat differential.* The market administrator shall announce, not later than the 14th day of each month, the uniform price computed pursuant to § 927.66 and, not later than the 5th day of each month, the weighted average butterfat differential pursuant to § 927.72 except that in any month in which the specified date is a Sunday or holiday, such announcements shall be not later than the next succeeding work-day.

PAYMENT BY HANDLERS DIRECTLY TO PRODUCERS

§ 927.70 *Time and rate of payments.* On or before the 25th day of each month each handler shall make payment to each producer for all milk delivered by such producer during the preceding [4231] month at not less than the uniform price subject to appropriate differentials set forth in § § 927.71 and 927.72: *Provided,* That each handler which is also a cooperative marketing association determined by the Secretary to be qualified under the Capper-Volstead Act may, with respect to producers who are members of and under contract with such association, make distribution, in accordance with the contract between the association and such members, of the net proceeds of all its sales in all markets in all use classifications. Whenever verification by the market administrator of the payment to any producer or cooperative association of producers for milk delivered to any handler discloses payment of less than is required by this subpart, the handler shall make up such payment to the producer or cooperative association of producers not later than the time of making payment next following such disclosure: *Provided further,* That if a handler claims that he cannot make the required payment because the producer is deceased or cannot be located, or because the cooperative association or its lawful successor or assignee is no longer in existence, such payment shall be made to the producer settlement fund, and in the event that the handler subsequently locates and pays the producer or a lawful claimant, or in the event that the

handler no longer exists and a lawful claim is later established, the market administrator shall make such payment from the producer settlement fund to the handler or to the lawful claimant as the case may be: *Provided further,* That, if not later than the date when such payment is required to be made, legal proceedings have been instituted by the handler for the purpose of administrative or judicial review of the market administrator's findings upon verification as provided above, such payment shall be made to the producer settlement fund and shall be held in reserve until such time as the above-mentioned proceedings have been completed, or until the handler submits proof to the market administrator that the required payment has been made to the producer or association of producers, in which latter event the payment shall be refunded to the handler.

§ 927.71 *Location differentials.* The uniform price shall be subject to the appropriate location differentials set forth below:

(a) The transportation differential shall be plus or minus the appropriate differential shown in column B of the schedule in § 927.42 for the zone of the plant to which the milk is delivered.

(b) The nearby differential shall be computed pursuant to the provisions of subparagraphs (1) through (6) of this paragraph.

(1) A zone shall be determined by the market administrator for each farm as follows: A zone for each minor civil division (township, borough, incorporated village, or city) within the nearby differential area shall be determined by computing the shortest highway mileage distance from the nearest point in the minor civil division to the nearest point specified in § 927.42, using the mileage guide specified in such section supplemented by U.S. Geological Survey maps. The zone of a farm shall be the same as the zone of the minor civil division in which the milkhouse of such farm is located: *Provided,* That all farms located

in the State of New Jersey shall be considered to be in the 1-50 mile zone.

(2) The weighted average percentage of milk utilized in Classes I-A and I-B for the 12-month period ending with the preceding month shall be computed: *Provided*, That for the 12 months following the effective date of this provision, such percentage shall be assumed to be 55 and over, but under 60.

(3) The rates of nearby differentials, except as provided in subparagraphs (4), (5), and (6), of this paragraph, shall be as set forth in the following table:

| Mileage zone of the farm pursuant to subparagraph (1) of this paragraph | Percentage utilization in Classes I-A and I-B as computed pursuant to subparagraph (2) of this paragraph | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| | Under 45 | 45 and over, but under 50 | 50 and over, but under 55 | 55 and over, but under 60 | 60 and over, but under 65 | 65 and over, but under 70 | 70 and over, but under 75 | 75 and over, but under 80 | 80 and over |
| | Dollars per hundredweight | | | | | | | | |
| 1-50 | 0 64 | 0 56 | 0 48 | 0 40 | 0 32 | 0 24 | 0 16 | 0 08 | 0 |
| 51-60 | 56 | 49 | 42 | 35 | 28 | 21 | 14 | 07 | 0 |
| 61-70 | 48 | 42 | 36 | 30 | 24 | 18 | 12 | 06 | 0 |
| 71-80 | 40 | 35 | 30 | 25 | 20 | 15 | 10 | 05 | 0 |
| 81-90 | 32 | 28 | 24 | 20 | 16 | 12 | 08 | 04 | 0 |
| 91-100 | 24 | 21 | 18 | 15 | 12 | 09 | 06 | 03 | 0 |
| 101-110 | 16 | 14 | 12 | 10 | 08 | 06 | 04 | 02 | 0 |
| 111-120 | 08 | 07 | 06 | 05 | 04 | 03 | 02 | 01 | 0 |

(4) For farms located in Columbia, Rensselaer, and Albany counties; and the townships of Catskill, Athens, Coxsackie, New Baltimore, Greenville, Cairo, and Durham in Greene County, the rate shall be as follows: for farms in the 91-120 mile zone, the rate otherwise applicable for farms in the 91-100 mile zone; for farms in the 121-130 mile zone, the rate otherwise applicable for farms in the 101-110 mile zone; and for farms in the 131-140 mile zone, the rate otherwise applicable for farms in the 111-120 mile zone.

(5) Farms delivering to plants in Columbia, Rensselaer, and Albany counties; and the townships of Catskill, Athens, Coxsackie, New Baltimore, Greenville, Cairo, and Durham in Greene County beyond the 131-140 mile zone, and for farms delivering to plants located in any other territory beyond the 111-120 mile zone shall not be eligible for the differentials set forth in this paragraph.

(6) The differential shall be reduced by 10 percent for each full 0.01 that the ratio computed pursuant to (i) of this subparaparaph exceeds the ratio computed pursuant to (ii) of this subparagraph:

(i) Divide the total receipts of milk subject to the nearby differential in the preceding 12 months by the total Class I-A milk in such 12 months, and

(ii) Divide the total receipts of milk subject to the nearby differential in the first 12 months of this provision by the total Class I-A milk in the first 12 months of this provision.

(c) Direct delivery differentials: For plants located in the areas specified in the following table, the handler shall pay to producers, in addition to that required by other provisions of this section, the amounts set forth below:

| *Mileage zone computed pursuant to § 927.42, or county—City or township* | *Rate—dollars per hundredweight* |
|---|---|
| 1-10 mile zone | $0.25 |
| 11-30 mile zone | .20 |
| 31-50 mile zone | .15 |
| 51-70 mile zone | .10 |
| 71-80 mile zone | .05 |
| Albany: | |
| Albany | 0.10 |
| Colonie | .10 |
| Watervliet | .10 |
| Green Island | .10 |
| Cohoes | .10 |
| Gilderland | .05 |
| New Scotland | .05 |
| Bethlehem | .05 |
| Coeymanas | .05 |
| Schenectady: | |
| Schenectady | .10 |
| Glenville | .05 |
| Niskayuna | .05 |
| Rotterdam | .05 |
| Montgomery: | |
| Amsterdam (city) | .05 |
| Amsterdam (township) | .05 |
| Saratoga: | |
| Waterford | .10 |
| Rensselaer: | |
| Troy | .10 |
| Rensselaer | .10 |
| Brunswick | .05 |
| N. Greenbush | .05 |

| *Mileage zone computed pursuant to § 927.42, or county— City or township* | *Rate—dollars per hundredweight* |
|---|---|
| E. Greenbush | $0.05 |
| Schodack | .05 |
| Onondaga: | |
| Syracuse | .05 |
| Manlius | .05 |
| DeWitt | .05 |
| Onondaga | .05 |
| Camillus | .05 |
| Solvay | .05 |
| Geddes | .05 |
| Salina | .05 |

§ 927.72 *Butterfat differential.* The uniform price shall be plus or minus, as the case may be, for each one-tenth of 1 percent above or below 3.5 percent of average butterfat content of milk delivered by any producer during any month, an amount equivalent to the average of the butterfat differentials determined pursuant to § 927.41, for each class weighted by the pounds of butterfat in the milk in each such class used in the computation of the uniform price for the preceding month. Such differential shall be computed to the nearest even tenth of a cent.

[4232] PRODUCER SETTLEMENT FUND AND ITS OPERATION

§ 927.75 *Producer settlement fund.* The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to § § 927.77 through 927.84.

§ 927.76 *Handlers' accounts.* The market administrator shall establish an account for each handler who is required to make payments to the producer settlement fund

or who received payments from the producer settlement fund. After computing the uniform price and each handler's pool debit or credit each month, and at such times as he deems appropriate, the market administrator shall render each handler a statement of his account showing the debit or credit balance, together with all debits or credits entered on such handler's account since the previous statement was rendered.

§ 927.77 *Payment to the producer settlement fund.* On or before the 18th day of each month each handler shall make full payment of the debit balance, if any, of such handler shown on the last statement of account rendered pursuant to § 927.76.

§ 927.78 *Payments out of producer settlement fund.* On or before the 20th day of each month the market administrator shall make payment to each handler of the credit balance, if any, of such handler shown on the last statement of account rendered pursuant to § 927.76. If, at any such time, the balance in the producer settlement fund is insufficient to make full payment due to each handler, the market administrator shall reduce uniformly the payments to each handler and shall complete such payments as soon as the necessary funds are available. No handler who, on the 25th day of the month, has not received such payments in full from the market administrator shall be deemed to be in violation of §§ 927.70 through 927.72 if he reduces his total payments to producers for milk delivered by such producers during the preceding month by not more than the amount of the reduction in payment from the producer settlement fund.

§ 927.79 *Handlers' pool debit or credit.* After computing the uniform price for each month, the market administrator shall compute each handler's pool debit or pool credit as follows:

(a) Multiply the quantity of milk received by each handler from producers by the uniform price.

(b) If the result obtained in paragraph (a) of this

section is less than the handler's net pool obligation, the difference shall be entered on the handler's producer settlement fund account as such handler's pool debit.

(c) If the result obtained in paragraph (a) of this section is greater than the handler's net pool obligation, the difference shall be entered on the handler's producer settlement fund account as such handler's pool credit.

§ 927.80 *Adjustments of errors in payments.* Whenever verification by the market administrator of reports or payments of any handler discloses errors made in payments to or from the producer settlement fund, the market administrator shall debit the handler's producer settlement fund account for any unpaid amount. Whenever verification discloses that payment is due from the market administrator to any handler, the market administrator shall credit the handler's producer settlement fund account for any such amount.

§ 927.81 *Cooperative payments for market-wide services.* Payments shall be made to qualified cooperatives or to federations under the conditions, in the manner, and at the rates set forth in this section.

(a) *Definitions.* As used in this section the following terms shall have the following meanings:

(1) "Cooperative" means a cooperative association of producers which is duly incorporated under the cooperative corporation laws of a state; is qualified under the Capper-Volstead Act (7 U. S. C. 291 et seq.); has all its activities under the control of its members; and has full authority in the sale of its members' milk.

(2) "Federation" means a federation of cooperatives.

(3) "Federated cooperative" means a cooperative which is a member of a federation and on whose membership the federation is an applicant for or receives payments under subparagraph (2) of paragraph (f) of this section.

(4) "Member" means, when used with respect to a member of a cooperative or of a federated cooperative, only a member who is also a producer, as defined in § 927.6.

(b) *Qualified cooperatives and federations.* A cooperative or federation may submit an application to the market administrator for payments under the provisions of this section. In accordance with the requirements of the rules and regulations issued by the market administrator, any such application shall include a written description of the applicant's program for the performance of market-wide services, including evidence that adequate facilities and personnel will be maintained by it so as to enable it to perform the market-wide services; and the application shall contain a statement by the applicant that it will perform the required market-wide services for which it is applying for payments. The application shall set forth all necessary data so as to enable the market administrator to determine whether it meets the qualification requirements with respect to the payments for which the application is submitted. An application shall be approved by the market administrator only if he determines that:

(1) In the case of a cooperative:

(i) It has not less than 4,000 members and receives from its members not less than 1 cent per hundredweight of milk delivered by them: *Provided*, That no person shall be counted in this respect as a member if he is a member of another cooperative which is an applicant for or which receives cooperative payments, or if he is a member of a federated cooperative.

(ii) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, it has not less than 6,000 members and receives from its members not less than 1 cent per hundweight of milk delivered by them, subject to the proviso in subdivision (i) of this subparagraph.

(iii) If the application is also for an additional payment under subparagraph (4) of paragraph (f) of this section, the cooperative is an operating cooperative which operates marketing facilities, i.e., pool plant(s), at which

it receives at least 25 per centum, by weight, of the milk marketed by its members: *Provided*, That in determing whether the 25 per centum minimum requirement is complied with, there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(2) In the case of a federation:

(i) It is duly incorporated under the laws of a state.

(ii) It has contracts with each of its federated cooperatives under which the cooperatives agree to remain in the federation for at least one year, and such contracts cover or will be renewed for a yearly period for every subsequent year for which the federated cooperatives are to be included within the membership of the federation for cooperative payment purposes.

(iii) Its federated cooperatives have an aggregate of not less than 4,000 members and the federated cooperatives receive from their members not less than 1 cent per hundredweight of milk delivered by them; and its federated cooperatives will pay to the federation, when required by rules and regulations issued by the market administrator, the minimum monthly payment specified in the rules and regulations to finance the activities of the federation that are not market-wide in character: *Provided*, That no person shall be counted in this respect as a member if he is a member of a cooperative which is an applicant for or which receives cooperative payments, or if he is a member of another federated cooperative.

(iv) If the application is also for an additional payment under subparagraph (3) of paragraph (f) of this section, the aggregate membership of the federated cooperatives is not less than 6,000 members and the federated cooperatives received from their members not less than 1 cent per hundredweight of milk delivered by their

members, subject to the proviso in subdivision (iii) of this subparagraph.

(v) If the application is also for an additional payment under subparagraph (5) of paragraph (f) of this section, the federation operates marketing facilities, i.e., pool plant(s), or the federated cooperatives operate marketing facilities, at which is received at least 25 per [4233] centum, by weight, of the milk marketed by the members of the federated cooperatives: *Provided*, That in determining whether the 25 per centum minimum requirement is complied with, there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) The applicant cooperative or federation demonstrates that it has the ability to perform the market-wide services for which application is made, and that such services will be performed.

(4) The applicant cooperative or the federated cooperatives of an applicant federation are in no way precluded from arranging for the utilization of milk under their respective control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(c) *Notice of qualification or denial: Effective date.* Upon determination by the market administrator that a cooperative or a federation is qualified to receive payment for performance of the market-wide services, he shall transmit such determination to the applicant cooperative or federation and publicly announce the issuance of the determination. The determination shall be effective with respect to milk delivered on and after the first day of the month following issuance of the determination. If, after consid-

eration of an application for payments for market-wide services, the market administrator determines that the cooperative or federation is not qualified to receive such payments he shall promptly notify the applicant and specifically set forth in such notice his reasons for denial of the application.

(d) *Requirements for continued qualification.* From time to time and in accordance with rules and regulations which may be issued by the market administrator, each qualified cooperative or federation must demonstrate to the market administrator that it continues to meet the qualification requirements for the payments and is fully performing the market-wide services for which it is being paid.

(e) *Market-wide services.* Each cooperative or federation shall perform the market-wide services enumerated in this paragraph. Such services are: (1) analyzing milk marketing problems and their solutions, conducting market research and maintaining current information as to all market developments, preparing and assembling statistical data relative to prices and marketing conditions, and making an economic analysis of all such data; (2) determining the need for the formulation of amendments to the order and proposing such amendments or requesting other appropriate action by the Secretary or the market administrator in the light of changing conditions; (3) participating in proceedings with respect to amendments to the order, including the preparation and presentation of evidence at public hearings, the submission of appropriate briefs and exceptions, and also participating, by voting or otherwise, in the referenda relative to amendments; (4) participation in the meetings called by the market administrator, such as meetings with respect to rules and regulations issued under the order, including activities such as the preparation and presentation of data at such meetings and briefs for submission thereafter; (5) conducting a comprehensive education program among producers—i. e., members and nonmembers of cooperatives—and keeping such producers well informed for participation in the activities under the regulatory order and, as a part of such program, issuing

publications that contain relevant data and information about the order and its operation, and the distribution of such publications to members and, on the same subscription basis, to non-members who request it, and holding meetings at which members and non-members may attend; and (6) in the case of a cooperative or federation which receives an additional payment under subparagraph (4) or (5) of paragraph (f) of this section, operating marketing facilities, or having within its membership federated cooperatives operating marketing facilities, i. e., pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by all the members of the cooperative or by all the members of the federated cooperatives' members.

(f) *Rate, computation, time, and method of payment.* (1) Subject to the provisions of paragraph (g) of this section, the market administrator, on or before the 25th day of each month, shall make payment out of the producer settlement fund, or issue equivalent credit therefor, to each cooperative or federation which is qualified for such payments for market-wide services. The payment to a cooperative shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from its members, and the payment to a federation shall be based upon the milk reported by cooperative or proprietary handlers to have been received during the preceding month from the members of its federated cooperatives, subject in both instances to adjustment upon verification by the market administrator.

(2) Such payment or credit shall be at the rate of 2 cents per hundredweight of milk in accordance with subparagraph (1) of this paragraph: *Provided,* That in computing payment to a cooperative, there shall be excluded all of the milk of its members who belong to another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk: *Provided further,* That in computing payment to a federation there shall be

excluded all of the milk of members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payments on the same milk, or which is not meeting the requirements of this section applicable to it.

(3) Any cooperative that has at least 6,000 members and any federation which has an aggregate membership of its federated cooperatives of at least 6,000 members shall receive a payment, in addition to the payment provided for in subparagraph (2) of this paragraph, of 1 cent per hundredweight of milk in accordance with subparagraph (1) of this paragraph and subject to the provisos contained in subparagraph (2) of this paragraph.

(4) Any cooperative that operates marketing facilities, i. e., pool plant(s), at which is received at least 25 per centum, by weight, of the milk marketed by its members shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph of 1 cent per hundredweight of all milk marketed by its members in accordance with subparagraph (1) of this paragraph: *Provided*, That in computing the payment under this subparagraph there shall be excluded the milk delivered by a member of the cooperative who is a member of another cooperative which is an applicant for or which receives cooperative payments on the same milk or which is a federated cooperative in a federation which is an applicant for or receiving cooperative payments on the same milk.

(5) Any federation that operates marketing facilities, i. e., pool plant(s), or whose members include one or more federated cooperatives that operate marketing facilities, at which is received at least 25 per centum, by weight, of the milk marketed by the members of its federated cooperatives shall receive a payment, in addition to the payment provided for in subparagraph (2) or subparagraph (3) of this paragraph, of 1 cent per hundredweight of all milk marketed by such members in accordance with subparagraph (1) of this paragraph: *Provided*, That in computing

the payment under this subparagraph there shall be excluded the milk delivered by members of a cooperative which is an applicant for or which receives cooperative payments on the same milk, or which is a federated cooperative in another federation which is an applicant for or receiving cooperative payment on the same milk, or which is not meeting the requirements of this section applicable to it.

(6) If an individually qualified cooperative is affiliated with a federation, the cooperative payment shall be made to such cooperative unless its contract with the federation specifies in writing that the federation is to receive the payments. Any such contract must authorize the federation to receive the payments for at least one year, and such agreement must cover or be renewed for a yearly period for every subsequent year for which the federation is to receive the payments.

(g) *Disqualification.* (1) The market administrator shall issue an order wholly or partly disqualifying a previously qualified cooperative or federation for payments authorized pursuant to this section and such payments shall not thereafter be made to it if he determines that:

[4234] (i) The cooperative or federation no longer complies with the requirements of this section: *Provided*, That in the case of the federation, if one of its federated cooperatives has failed to comply with the requirements of this section applicable to it or has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification; the federation shall be disqualified only to the extent that its qualification for payments or the amount of its payments are based upon the membership, milk, or operations of such non-complying federated cooperatives;

(ii) The cooperative or federation has failed to make reports or furnish records pursuant to this section or pur-

suant to rules and regulations issued by the market administrator; or

(iii) In the case of the cooperative, it has failed, promptly after demand by the market administrator, to arrange for the utilization of milk under its control so as to yield the highest available net return to all producers without displacing an equivalent quantity of other producer milk in the preferred classification.

(2) An order of the market administrator wholly or partly disqualifying a cooperative or federation shall not be issued until after the cooperative or federation has had opportunity for hearing thereon following not less than 15 days' notice to it specifying the reasons for the proposed disqualifications. If the cooperative or federation fails to file a written request for hearing with the market administrator within such period of 15 days, the market administrator may issue an order of disqualification without further notice; but if within such period a request for hearing is filed, the market administrator shall promptly proceed to hold such hearing pursuant to rules and regulations issued by him under paragraph (i) of this section.

(3) A disqualification order issued by the market administrator shall set forth the findings and conclusions on the basis of which it is issued.

(h) *Appeals*—(1) *From denials of application.* Any cooperative or federation whose application for qualification has been denied by the market administrator may, within 30 days after notice of such denial, file with the Secretary a written petition for review. But the failure to file such petition shall not bar the cooperative or federation from again applying to the market administrator for qualification.

(2) *From disqualification orders.* A disqualification order by the market administrator shall become final 30 days after its service on the cooperative or federation unless within such 30-day period the cooperative or federation files a written petition with the Secretary for re-

view thereof. If such petition for review is filed, payments for which the cooperative or federation has been disquaiified by the order shall be held in reserve by the market administrator pending ruling of the Secretary, after which the sums so held in reserve shall either be returned to the producer settlement fund or paid over to the cooperative or federation depending on the Secretary's ruling on the petition. If such petition for review is not filed, any payments which otherwise would be made within the 30-day period following issuance of the disqualification order shall be held in reserve until such order becomes final and shall then be returned to the producer settlement fund.

(3) *Record on appeal.* If an appeal is taken under subparagraphs (1) or (2) of this paragraph, the market administrator shall promptly certify to the Secretary the ruling or order appealed from and the evidence upon which it was issued: *Provided,* That if a hearing was held the complete record thereof, including the applications, petitions, and all exhibits or other documentary material submitted in evidence shall be the record so certified. Such certified material shall constitute the sole record upon which the appeal shall be decided by the Secretary.

(i) *Regulations.* The market administrator is authorized to issue regulations and amendments thereto to effectuate the provisions of this section and to facilitate and implement the administration of its provisions. Such regulations shall be issued in accordance with the following procedure:

(1) All proposed rules and regulations and amendments thereto shall be the subject of a meeting called by the market administrator, at which all interested persons shall have opportunity to be heard. Not less than five days prior to the meeting, notice thereof and of the proposed regulations or amendments shall be published in the FEDERAL REGISTER and mailed to qualified cooperatives and federations. A stenographic record shall be made at such meetings which shall be public information and be available for inspection at the office of the market administrator.

(2) A period of at least five days after the meeting shall be allowed for the filing of briefs.

(3) All regulations and amendments thereto issued by the market administrator pursuant to this section must be submitted in tentative form to the Secretary for approval, shall not be effective without such approval, and shall be published in the FEDERAL REGISTER following such approval. The regulations or amendments in tentative form shall be forwarded also to cooperatives and federations qualified under this section and to other persons upon request in writing. The Secretary shall either approve the regulations or amendments thereto submitted by the market administrator or direct the market administrator to reconsider the tentative rules or amendments. In the event the market administrator is directed to give reconsideration to the matter, the market administrator shall either issue revised tentative regulations or amendments or call another meeting pursuant to this section for additional consideration of the rules or amendments.

(j) *Reports and records.* A qualified cooperative or federation and any federated cooperative in a qualified federation shall make such reports to the market administrator as may be requested by him for the administration of the provisions of this section, and shall maintain and make available to the market administrator or his representative such records as will enable the market administrator to verify such reports.

(k) *Notices, demands, orders, etc.* All notices, demands, orders, or other papers required by this section to be given to or served upon a cooperative or federation shall be deemed to have been given or served as of the time when mailed to the last known secretary of the cooperative or federation at his last known address.

§ 927.82 *Cream payments.* (a) For milk received from producers which is classified as Class III pursuant to § 927.37 (d) (2) the butterfat from which is subsequently assigned in accordance with the provisions of the rules and regulations issued by the market administrator pursuant

to § 927.36 to sour cream, half and half, or reconstituted cream shipped to, received in, or distributed in the metropolitan district, or is not established to have been otherwise utilized, or to be still in storage, the handler required to file reports pursuant to § 927.52 shall pay to the producer settlement fund or be issued debits against balances due to such handler from the producer settlement fund an amount equal to 9 cents per pound of butterfat if the milk was separated in the months of March through July, and 10 cents per pound of butterfat if the milk was separated in the months of August through February.

(b) On the basis of reports pursuant to § 927.52 of the utilization of frozen cream and the market administrator's investigation and audit of such reports, the market administrator shall make payment out of the producer settlement fund to the handler filing such reports, or issue credit against balances due from such handler to the producer settlement fund, an amount equal to the buttercheese adjustment on each pound of butterfat in such cream which was separated in the months of April through September from milk received from producers and was assigned, in accordance with the provisions of the rules and regulations issued by the market administrator pursuant to § 927.36, to butter in the months of January through March.

(c) With respect to Class II milk the butterfat from which is on hand at the plant in the form of cream, or having left the plant in the form of cream had not been delivered to a plant or purchaser by the end of the period for establishing classification, but subsequent to the end of the period for establishing classification such cream is so handled that it would have been classified at a plant outside the marketing area in Class III pursuant to § 927.37 (d) (1), (3), (5), or (6) had such handling occurred during the period for establishing classification, the handler who received the milk from producers may claim a refund by filing a report giving the facts with respect to such handling. On the basis of verification of such report, the market administrator shall make payment out of the producer settlement fund to such handler or issue credit against

any balance due from such han- [4235] dler to the producer settlement fund in an amount equal to the difference between the Class II and Class III prices applicable for the month when the milk was received from producers.

§ 927.83 *Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in § 927.65 (b) (2) or (3) was received from the handler's own farm.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another

order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this subpart: *Provided,* That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to § 927.44 adjusted for the location of the plant.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided,* That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 as similarly adjusted for location.

(3) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther

from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to § 927.46 (b) (9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Provided*, That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 similarly adjusted for location.

(4) For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

(5) In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate han-

dler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80.

§ 927.84 *Payments on milk or milk products the source of which is not established.* Payments shall be made by handlers to producers through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk which milk or milk product meets each of the conditions

specified in subparagraphs (1) and (2) and, if applicable, subparagraph (3) of this paragraph.

(1) It was derived from milk for which the farm source is not established.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant.

(3) If first found at a nonpool plant, the milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk is subject to the fluid skim differential.

(b) The amounts of payment for the product set forth in paragraph (a) of this section shall be as follows:

(1) For milk, concentrated fluid milk, fluid milk products, or cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the value of such milk, fluid milk products, cultured or flavored milk drinks, or the milk equivalent of such concentrated fluid milk at the class price at the plant where first found.

(2) For cream, half and half, fluid cream products, or cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat, the value of the milk equivalent of such product at a rate per hundredweight computed pursuant to § 927.40 (d) (1) adjusted by the differentials set forth in column C in the table in § 927.42 for the zone of the plant at which first found.
[4236] (3) For skim milk in a form subject to the fluid skim milk differential, the value at a rate per hundredweight computed as follows: divide the amount computed pursuant to § 927.40 (d) (2) by 0.9125, add an amount computed pursuant to § 927.44, and adjust the result by the differential set forth in column B in the table in § 927.42 for the zone of the plant where first found.

(4) For skim milk in a form not subject to the fluid skim milk differential, the value at a rate per hundredweight

computed as follows: divide the amount computed pursuant to § 927.40 (d) (2) by 0.9125.

(5) In computing the milk equivalent value of products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(e) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph:

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80.

EXPENSE OF ADMINISTRATION

§ 927.90 *Payment by handlers.* As his pro rata share of the expense of administration of this part, each handler shall, on or before the 18th day of each month, pay to the market administrator a sum not exceeding two cents per hundredweight on the total quantity of milk which was received from producers at plants operated by such handler, directly or at the instance of a cooperative association of producers, the exact amount to be determined by the

market administrator subject to review by the Secretary. This section shall not be deemed to duplicate any similar payment by any handler under an order issued by the Commissioner of Agriculture and Markets of the State of New York, or the Director of the New Jersey Office of Milk Industry, with respect to the marketing area. Whenever verification by the market administrator discloses an error in the payment made by any handler, such error shall be adjusted not later than the date next following such disclosure on which payments are due pursuant to this section.

MISCELLANEOUS

§ 927.95 *Termination of obligations.* The provisions of this section shall apply to any obligation under this part for the payment of money irrespective of when such obligation arose, except an obligation involved in an action instituted before August 1, 1949, under section 8c (15) (a) of the act or before a court.

(a) The obligation of any handler to pay money required to be paid under the terms of this part shall, except as provided in paragraphs (b) and (c) of this section, terminate two years after the last day of the calendar month during which the market administrator receives the handler's utilization report on the milk involved in such obligation, unless within such period the market administrator notifies the handler in writing that such money is due and payable. Service of such notice shall be complete upon mailing to the handler's last known address, and it shall contain, but need not be limited to, the following information:

(1) The amount of the obligation;

(2) The month(s) during which the milk, with respect to which the obligation exists, was received or handled; and

(3) If the obligation is payable to one or more producers or to an association of producers, the name of such

producer(s) or association of producers, or if the obligation is payable to the market administrator, the account for which it is to be paid.

(b) If a handler fails or refuses, with respect, to any obligation under this part, to make available to the market administrator or his representatives all books and records required by this part to be made available, the market administrator may, within the two-year period provided for in paragraph (a) of this section, notify the handler in writing of such failure or refusal. If the market administrator so notifies a handler, the said two-year period with respect to such obligation shall not begin to run until the first day of the calendar month following the month during which all such books and records pertaining to such obligation are made available to the market administrator or his representatives.

(c) Notwithstanding the provisions of paragraphs (a) and (b) of this section, a handler's obligation under this subpart to pay money shall not be terminated with respect to any transaction involving fraud or willful concealment of a fact, material to the obligation, on the part of the handler against whom the obligation is sought to be imposed.

(d) Any obligation on the part of the market administrator to pay a handler any money which such handler claims to be due him under the terms of this part shall terminate two years after the end of the calendar month during which the milk involved in the claim was received (or with respect to storage cream payments pursuant to § 927.82 (b), two years after the end of the calendar month during which such cream is utilized) if an underpayment is claimed, or two years after the end of the calendar month during which the payment (including deduction or set-off by the market administrator) was made by the handler if a refund on such payment is claimed, unless such handler, within the applicable periods of time, files

pursuant to section 8c (15) (A) of the act, a petition claiming such money.

§ 927.96 *Continuing obligation of handlers.* Unless otherwise provided by the Secretary in any notice of amendment, termination, or suspension of any or all of the provisions of this part, such amendment, termination, or suspension shall not affect, waive, or terminate any right, duty, obligation, or liability which shall have risen or may thereafter arise in connection with any provision of this subpart; release or waive any violation of this subpart occurring prior to the effective date of such amendment, termination, or suspension; or affect or impair any rights or remedies of the Secretary or of any other person with respect to any such violations.

§ 927.97 *Continuing power and duty of market administrator.* The market administrator shall (a) continue in such capacity until discharged by the Secretary; (b) from time to time account for all receipts and disbursements and deliver all funds or property on hand, together with the books and records of the market administrator, to such person as the Secretary shall direct; and (c) if so directed by the Secretary execute such assignments or other instruments necessary or appropriate to vest in such person full title to all funds, property, and claims vested in the market administrator pursuant to this part.

§ 927.98 *Liquidation.* Upon the termination or suspension of this part, the market administrator shall, if so directed by the Secretary, liquidate the business of the market administrator's office and dispose of all funds and property then in his possession or under his control, together with claims for any funds which are unpaid and owing at the time of such termination or suspension. Any funds collected for expenses pursuant to the provisions of this part over and above the amounts necessary to meet outstanding obligations and the expenses necessarily incurred by the market administrator in liquidating the business of the market administrator's office shall be distrib-

uted by the market administrator to handlers in an equitable manner.

§ 927.99 *Agents.* The Secretary may, by designation in writing, name any officer or employee of the United States to act as his agent or representative in connection with any of the provisions of this part.

[F. R. Doc. 57-4838; Filed, June 13, 1957; 8:48 a.m.]

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[fol. 889]

IN UNITED STATES DISTRICT COURT

PROMULGATION PROCEEDINGS

(EXCERPTS)

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C. W. PIERCE

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By Mr. Daniels:

Q. Doctor, I would like to explore with you for just a few moments compensatory payments, and ask you, as an economist, what your basic theory is with respect to compensatory payments. I don't mean what you have offered by way of a proposal. I just want to know as an economist what your economic theory is with respect to compensatory payments.

A. The purpose, Mr. Daniels, as I see compensatory payments, is to equalize the cost to handlers on milk that is regulated by the order and priced by the order, and comes from order plants, to equalize the cost on milk from other sources that come into the marketing area for similar uses, particularly Class I.

Q. It isn't your theory, then, that compensatory payments should have the function of guaranteeing to any group of producers any part of the market or Class I market?

A. No. The compensatory payment that I suggested, that we have suggested, is not for the purpose of keeping milk out of the market.

Q. Have you not suggested—it has been a long time since you were on the stand—that so far as bulk milk is concerned, that compensatory payments be paid, regardless of what price was paid the producers by the shipping handler?

A. Because there is in the area a considerable volume of milk at plants which supply other markets—

Q. Which what?

A. —at plants which supply other markets than this marketing area, there is the decided possibility of the sur-

plus of milk for these other markets finding its way into Class I use in the proposed marketing area, and we have [fol. 890] suggested that that milk pay a compensatory payment equal to the difference between the North Jersey Class I and Class II prices figured at the plant where the milk originates, for the purpose of causing that surplus milk of other markets to carry the same cost as Class I milk priced regularly under the order.

Q. Suppose it could be established that that milk that came in here, even though it might be termed by you as surplus for another market, was actually paid for at the Order 90 prices? Then a requirement for a compensatory payment could not be reconciled with your theory of compensatory payments, could it?

A. If it were possible to establish that that milk was paid for at the class prices existing under the order, then it may be that the compensatory payment we have suggested on that milk is higher than it should be.

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LELAND SPENCER

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By Mr. Daniels:

Q. Dr. Spencer, just one last question on the problem that we were discussing before the recess. The administrative angles could be facilitated so far as Pennsylvania is concerned by the fact that Pennsylvania has a well-organized milk control commission and audits the accounts of all handlers for every month in the year. That certainly would be a long step in the right direction to determine what they actually paid, wouldn't it?

A. I think that would help a lot, yes, sir.

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[fol. 891] GLEN A. BOGER

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Q. Now, Mr. Boger, when you face the long period, say, of May or any other flush period, do you lay off any of your farmers or do you divert any of your farmers to Order 27 plants?

A. We never lay off any farmer at any time or we never require any farmer to keep any of his milk at home.

Q. Or do you ever divert any of the milk to Order 27 plants?

A. No, we don't divert it to anybody.

* * * * * * *

Q. In your opinion have you and your producers worked out a rather satisfactory adjustment between supply and fluid milk requirements, what we call Class I?

A. We think it worked out fairly well. I believe I have it figured out as to what the relation is. Last year—

Q. What page, sir?

A. Page 5.

Q. Of the same report we spoke about? A. The same annual report.

Last year the average daily delivery per producer in the month of November was 77 percent of what it was in May; that is in the third paragraph from the bottom.

Q. That was for the month of November?

A. Yes, in November it was 77 percent of what it was in May.

Q. Oh, I see. Now that has come about by the intelligent and educational program that you work out with your producers?

A. That is right. It has come about largely through that and largely that they know in the spring they get a lower price for milk compared to what they get in the fall months. [fol. 892] Q. And the Milk Control Commission has also followed a price change downward in April and up in September?

A. That is right.

Q. You are also active in all hearings in Pennsylvania in which you do business, in the areas in which you do business, and you are acquainted with your competition in the area 6, are you not?

A. We surely are.

Q. And also in Philadelphia?

A. Yes.

Q. And also I-A?

Examiner Hyde: What is the last?

Mr. Daniels: Area 1-A.

Mr. Ware: What is Area 6?

Mr. Daniels: Allentown, Easton, Bethlehem.

By Mr. Daniels:

Q. Has the balance between production and Class I needs been pretty well adjusted for those dealers as well as you?

A. I believe it has. I believe there is pretty generally about the same balance.

Q. From what you know about the milk industry, are these dealers in the springtime laying off producers or diverting milk to Order 27, or in the fall are they getting milk from Order 27 plants?

A. The large companies I think all manufacture their surplus milk and do not divert any milk anywhere. Smaller dealers, and I mean smaller dealers, fellows that maybe have 10 or 12 farmers delivering to them. And oftentimes they require farmers to keep a portion of their milk at home.

Q. But that milk doesn't get into Order 27?

A. That does not. I don't know of anybody who lays off farmers in the spring months.

* * * * * * *

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[fol. 893] I, Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit, Do Hereby Certify the foregoing to be a true and faithful copy of the original excerpts from pages 12415, 12416, 12417, 15029, 15316, 15322 and 15324 of the transcript of testimony relating to sections 927.83 and 927.84 of order No. 27 at the hearing before the examiner, which transcript is part of the record on appeal in the case of Lehigh Valley Cooperative Farmers vs. Ezra Taft Benson, Secretary of Agriculture of the United States of America, appellant, No. 13290, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 11th day of July 1961,

Ida D. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit.

(Seal)

[fol. 900]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

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No. 13,289

---

UNITED STATES OF AMERICA, Appellant,

v.

LEHIGH VALLEY COOPERATIVE FARMERS, INC. and SUNCREST FARMS, INC., Appellee.

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No. 13,290

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., Appellee,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

---

No. 13,291

---

SUNCREST FARMS, INC., Appellee,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

---

Appeals from the United States District Court for the Eastern District of Pennsylvania

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Argued December 2, 1960

Before McLaughlin, Hastie and Forman, Circuit Judges.

[fol. 901]

OPINION OF THE COURT—Filed February 20, 1961

By McLaughlin, Circuit Judge.

The prime issue presented by these appeals is whether certain provisions of New York-New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 et seq., (hereinafter referred to as Order No. 27), requiring all non-pool handlers of milk, to make a "compensatory payment" to the Producers Settlement Fund for all non-pool fluid milk distributed by them in the marketing area, 7 C.F.R. §§ 927.83, 927.84, contravenes the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq.

Docket No. 13,289, is an enforcement action brought by the United States pursuant to § 8a (6) of the Act, 7 U.S.C. § 608a (6), to require Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc., to make the compensatory payments required by the order. Dockets Nos. 13,290 and 13,291, are actions by the Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., respectively to obtain judicial review of decisions of the Judicial Officer in the United States Department of Agriculture pursuant to § 8c (15) of the Act, 7 U.S.C. § 608c (15) (B). The Judicial Officer held that the contested provisions for compensatory payment were valid.

In the district court, all three actions were consolidated for trial.[1] In its opinion reported in 183 F.Supp. 80 (1960), that court, although finding the provisions for compensatory payments supported by the record and "incidental to * * * and necessary to effectuate the other provisions of such order," invalidated them under the authority of the majority holding in Kass v. Brannan (Judge Learned Hand

[1] In Docket No. 13,289, pending final outcome of the cases, the district court ordered that the compensatory payments be paid into the registry of the court, and enjoined Lehigh from further violating Order No. 27.

[fol. 902] dissenting), 196 F.2d 791 (2 Cir. 1952).[2] The court noted however:

> "Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret § 608c (5), we do not feel justified in now rejecting the interpretation there placed upon § 608c (5) (A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight."

The primary policy of Congress in enacting the Federal Milk Control program and particularly Order No. 27, applicable in the case at bar,[3] was " * * * to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices * * * ." 7 U.S.C. § 602 (1) (1952). Regarding milk, the plight of the farmers (referred to as producers in the milk industry) was caused by the fierce competition to procure the most lucrative market for it. Since fluid milk brought the highest return to the producer and cream or milk product utilization was less rewarding, the rivalry was for that market. To alleviate the harsh effects of that struggle on producers, Congress enacted the governing law vesting the Secretary of Agriculture with broad regulatory powers. Pursuant to the statutory authorization, the Secretary of Agriculture has promulgated regional milk orders based on a system of [fol. 903] milk pooling. Those orders, with their programs

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[2] Specifically the district court stated:

"* * * in light of the *Kass* v. *Brannan* decision *supra*, the Order as promulgated did not comply with Section 608c (5) (A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producers Settlement Fund by them must be stricken down."

[3] For a more detailed discussion of the Order and the problems of the milk industry, see Nebbia v. New York, 291 U.S. 502 (1934); United States v. Rock-Royal Co-op., 307 U.S. 533 (1933).

of classification and reporting are geared to provide the producer in the specified marketing area with a uniform price for all milk delivered by him for processing, irrespective of the particular use to which it is ultimately put.

This is accomplished by the following method. Under Order No. 27 milk utilization is classified into three fundamental groups: Class I (fluid milk); Class II (cream); Class III (milk products, butter, cheese, etc. * * *). The Market Administrator fixes a price for each class. He then determines from reports filed by the handlers the volume of milk used in each classification throughout the marketing area. From those figures, the Administrator computes the value of all milk used in the Marketing Area by multiplying the market volume figure in each class by the class price. After adding the totals and making certain additions and/or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area, to determine the uniform blend price which is paid to all producers, regardless of the utilization of their milk. Since each handler's use of the milk received from producers would not average out to the uniform blend price, a Producers Settlement Fund was created. This fund is contributed to by those handlers whose total class utilization price of the milk exceeds the uniform blend price and is drawn upon by those handlers whose total class utilization price of the milk is less than the uniform blend price. Thus although the producer receives the uniform blend price regardless of the utilization of his milk, the handler must account to all other handlers through the Producers Settlement Fund for the price of his actual use of the milk purchased by him.

Lehigh and Suncrest are not fully regulated handlers, the largest part of their milk business being outside the marketing area. However, since a certain percentage of their outlets for milk (approximately 5%) are in the mar- [fol. 904] keting area, they are subject to the compensatory payment provisions of Order No. 27, 7 C.F.R. §§ 927.83, 927.84, which provide that where a non-pool handler distributes milk for Class I utilization in the marketing area, he must pay into the Producers Settlement Fund a com-

pensatory payment measured by the difference between the Class I and Class III price.

Lehigh and Suncrest attacked this provision and were sustained by the district court on the authority of Kass v. Brannan, supra. That case held that mandatory compensatory payments imposed upon non-pool handlers for fluid milk distributed in the marketing area were, " * * * inconsistent with the terms and conditions specified in section 8c (5) (A) * * * ." That section reads as follows:

"Milk and its products; terms and conditions of orders.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

[fol. 905] To reach its conclusion, the court in Kass compared the cost of the milk to pool handlers with that of non-pool handlers. It stated that although the cost to a pool handler is the class price, a non-pool handler's cost is composed of two items, the amount it pays the seller and the amount of the compensatory payment. The court decided that since the payment is based on the difference between two class prices without taking into account the initial cost to the handler, the result is a disparity between the non-pool handler's total cost and the pool handler's

total cost which violates the uniformity provision of Section 8c (5) (A) of the Act. We cannot agree with the holding.[4]

The Kass opinion assumes that the minimum class price provision of Section 8c (5) (A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:

> "The result sought to be achieved by Congress in this section [8c (5) (A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage." (Emphasis supplied).

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

Section 8c (5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account [fol. 906] of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U.S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F.Supp. 66, 73 (N.D. Ohio 1960).

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[4] We note that a recent case in the District Court of Connecticut, Knudsen Brothers Dairy, Inc. v. Benson, Civil No. 8145 (D.C.Conn. July 19, 1960), followed the mandate of its circuit as set forth in the Kass opinion. As it adds nothing to the conclusion in Kass it will not be discussed.

Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the Kass case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

It is evident that in all three illustrations, employment of the Kass theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing [fol. 907] area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.[5]

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[5] Examination of the Kass opinion on its own facts reveals that Kass was a *handler* who purchased cream and condensed milk from another handler. Pursuant to Section 927.9 (b) of Order No. 27, Kass was charged compensatory payments on the cream measured by the difference between the Class II-A and Class IV-A price and on the condensed milk measured by the difference between the Class II-B and Class IV-A price. Clearly Section 8c (5) (A) has no application in such a situation. It only contemplates minimum class prices which *handlers* shall account to the pool for on milk purchased from *producers*. It makes no reference to situations where *handlers* purchase milk from other *handlers*. Even if it could be said that it was designed to limit the imposition of com-

We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: "Such price shall be uniform as to all handlers," guarantees them a cost equal to that of pool handlers.[6] But there is not the slightest indication that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan. "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must [fol. 908] be related to the scheme as a whole."[7] This was acknowledged early in the history of the Act by the Supreme Court when it held that agency cooperatives were subject to the Act even though they did not technically purchase the milk of their producers. United States v. Rock Royal Co-op., 307 U.S. 533 (1938). See also Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 95 (8 Cir. 1946).

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pensatory payments at all, and we hold that it was not, it would be applicable solely to handler-producer transactions, and not to handler-handler transactions. Lawson Milk Company v. Benson, 187 F.Supp. 66, 70-71 (N.D. Ohio 1960); see also, dissenting opinion of Judge Learned Hand in Kass v. Brannan, 196 F.2d at 799.

[6] As a matter of statutory construction if we were to adopt the theory of Lehigh and Suncrest and thereby include non-pool producers within the ambit of the term "producers" in Section 8c (5) (A), the provisions of the next section, 8c (5) (B), which requires payment of the uniform blend price to "producers", would also be applicable to Lehigh and Suncrest. In effect, the Market Administrator would have the choice of either imposing full regulation on Lehigh and Suncrest or no regulation at all. So limiting the discretion of the Market Administrator is inconsistent with the tenor of the entire act and contrary to the accepted judicial interpretation of its terms. See, e.g., Queensboro Farms Products v. Wickard, 137 F.2d 969, 977 (2 Cir. 1943); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 94-95 (8 Cir. 1946).

[7] Frankfurter, J., in Stark v. Wickard, 321 U.S. 288, 311, 315 (1944) (dissenting opinion).

The Act does not attempt nation-wide regulation, but rather " * * * authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable." United States v. Rock Royal Co-op., supra at 576. "The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions." Bailey Farm Dairy Co. v. Anderson, supra at 90. This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend price to producers and must account to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory [fol. 909] payments, they are unfettered as to price, market and amount of distribution.[8]

The aim of Section 8c (5) (A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c (5) (B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mech-

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[8] Although admittedly Lehigh Valley Cooperative Farmers, Inc., is subject to another milk order, as we view Section 8c (5) (A) that has no bearing on its position concerning sales in the Order No. 27 area.

anism to achieve the ultimate goal of the Act, stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

The final contentions of Lehigh and Suncrest are that the provisions for compensatory payments are not allowed by the Act and not supported by the record. As we have stated previously, the district court found the provisions "incidental to * * * and necessary to effectuate the other provisions of such order" under Section 8c (7) (D) of the Act and also found the provisions supported by the record. We agree with the district court's conclusion. 183 F.Supp. at pp. 89, 90. See also Lawson Milk Company v. Benson, supra, at pp. 72, 73.

The judgment of the district court will be reversed and the proceedings remanded to that court with instructions (1) to affirm the ruling and decision of the Judicial Officer in Lehigh Valley Cooperative Farmers, Inc. v. Benson, No. 13,290, and Suncrest Farms, Inc. v. Benson, No. 13,291; and (2) to issue an injunction as prayed for in the com- [fol. 910] plaint in United States v. Lehigh Valley Cooperative Farmers, Inc., et al., No. 13,289 to require the appellees to comply with the terms of §§ 927.29(d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay to the Market Administrator the money in the registry of the district court in this proceeding.

[fol. 911] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,289

---

UNITED STATES OF AMERICA, Appellant,

vs.

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

---

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Hastie and Forman, Circuit Judges.

JUDGMENT—February 20, 1961

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded with instructions to issue an injunction as prayed for in the complaint to require the defendants to comply with the terms of 927.29 (d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay the Market Administrator the money in the registry of the District Court in this proceeding.

February 20, 1961

[fol. 912] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,290

---

LEHIGH VALLEY COOPERATIVE FARMERS,

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

---

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Hastie and Forman, Circuit Judges.

JUDGMENT—February 20, 1961

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

February 20, 1961

[fol. 913] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,291

---

SUNCREST FARMS, INC.,

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

---

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

Present: McLaughlin, Hastie and Forman, Circuit Judges.

JUDGMENT—February 20, 1961

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

February 20, 1961

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[fol. 914] Petition for Rehearing covering 12 pages filed March 4, 1961 omitted from this print.

It was denied, and nothing more by order March 10, 1961.

[fol. 915] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

---

No. 13,289

---

UNITED STATES OF AMERICA, Appellant,

v.

LEHIGH VALLEY COOPERATIVE FARMERS, INC. and SUNCREST FARMS, INC., Appellee.

---

No. 13,290

---

LEHIGH VALLEY COOPERATIVE FARMERS, INC., Appellee,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

---

No. 13,291

---

SUNCREST FARMS, INC., Appellee,

v.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America, Appellant.

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Present: McLaughlin, Hastie and Forman, Circuit Judges.

ORDER DENYING PETITION FOR REHEARING—March 10, 1961

The petition for rehearing in these cases is denied.

By the Court

McLaughlin, Circuit Judge.

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[fol. 916] Pursuant to Rule 36 (2) of this Court, it is Ordered that issuance of the mandate in the above cause be, and it is hereby stayed until April 14, 1961.

Dated: March 15, 1961

McLaughlin, Circuit Judge.

[fol. 917] Clerk's Certificate to foregoing transcript (omitted in printing).

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[fol. 918]

SUPREME COURT OF THE UNITED STATES

No. 892—October Term, 1960

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,
Petitioners,

vs.

UNITED STATES et al.

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ORDER ALLOWING CERTIORARI—June 19, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.S.
FILED
APR 12 1961
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

No. 479

LEHIGH VALLEY COÖPERATIVE FARMERS, INC.,

and

SUNCREST FARMS, INC.,

*Petitioners*

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1960**

---

LEHIGH VALLEY COOPERATIVE FARMERS, INC.,

and

SUNCREST FARMS, INC.,

*Petitioners*

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

*Respondents.*

---

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc., pray that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit, entered on February 20, 1961 at Nos. 13,289, 13,290 and 13,291 below. These cases were consolidated by the District Court and the Court below. Rehearing denied March 10, 1961.

## Opinions Below

The opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The opinion of the United States Court of Appeals for the Third Circuit is printed in the Appendix hereto, page 32, and as yet is unreported.

## Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit were entered February 20, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

## Questions Presented

These proceedings are brought under the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. 601, *et seq.* It was declared in these Acts to be the policy of Congress, through the powers conferred upon the Secretary of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices . . .". By the authority of the Act, the Secretary of Agriculture has established marketing orders to regulate the handling of milk and milk products in various marketing areas throughout the country. The issues in the present case arise out of certain provisions included by the Secretary in Order No. 27, the Milk Marketing Order in effect in the New York-New Jersey Milk Marketing Area. Under the Order, pool plants are fully regulated by the Order and must comply with the various shipping and sales requirements of the Order. A pool handler is one who operates such a plant. Any other plant or any other handler is considered non-pool. The questions presented are:

1. Does Section 8c(5), and particularly subsection 8c(5)(A) of the Agricultural Marketing Agreement

Act of 1937, as amended, which requires that "such prices shall be uniform as to all handlers * * *", permit the Secretary to impose on handlers operating non-pool plants, compensatory payments which, when added to the actual prices paid by such handlers to dairy farmers or producers for the milk, result in a substantially higher price than is required to be paid by handlers operating pool plants under Federal Order No. 27?

2. Does subsection 8c(7)(D), which authorizes provisions "incidental to," "not inconsistent with" and "necessary" and which this Court has said "* * * gives opportunity only to include provisions auxiliary to those definitely stated", permit the imposition of such compensatory payments?

3. Does subsection 8c(5)(G), which provides that a Federal Order applicable to milk and its products shall not prohibit the flow of milk from any production area into a marketing area, permit provisions imposing such compensatory payments when the effect of such provisions is, in fact, to prohibit the entry into the marketing area of outside milk?

4. If subsection 8c(7)(D) does permit the imposition of such compensatory payments, without regard to the "terms and conditions specified in subsection 8c(5)(A)", is it an illegal delegation of legislative authority in that no standards are set and no course charted which the Secretary must comply with or follow?

5. Are the words "producers" and handlers" as used in subsection 8c(5)(A) limited to mean only "pool handlers" and "producers shipping to pool plants", even though those terms were not used by the Secretary until much after the enactment of the statute, and in light of the fact that the Secretary in Order No. 27 defines "handlers" to include both non-pool and pool handlers?

6. If the meaning of the words "producers" and "handlers" is to be so limited, as held by the Court below, does the statute, then, in any section whatsoever authorize the Secretary to regulate non-pool handlers and dairy farmers in any respect?

7. Can it be said that handlers who have served a segment of the present marketing area over a long

period of years before the expansion of the marketing area, caused a loss of sales to producers who ship to pool handlers?

## Statutes and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 601 *et seq.* Provisions essential to this case are set forth in the Appendix hereto, page 23.

The administrative order involved herein is Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey Milk Marketing Area. The amendments under attack were issued by the Secretary of Agriculture of the United States, to become effective August 1, 1957 (7 C.F.R., Section 927.1 *et seq.*, 1957). The particular provisions directly involved in this case are Sections 927.5, 927.6, 927.7, 927.83 and 927.84. These are the pertinent provisions of Federal Order No. 27 and appear in the Appendix hereto, page 26.

## Statement of the Case

Petitioners Lehigh Valley Cooperative Farmers, Inc. and Suncrest Farms, Inc. are processors and distributors of milk whose plants are located respectively in Allentown and Bethlehem, Pennsylvania. Petitioners have distributed fluid milk into northern New Jersey, in and around the city of Phillipsburg, for twenty-five years and fifteen years, respectively. They are milk "handlers" as that term is defined by section 927.7 of Federal Milk Marketing Order No. 27, 7 C.F.R. 927.7, and as used in section 8c(5)(A) of the Agricultural Marketing Agreement Act. Amendments to Order No. 27, effective August 1, 1957, extended the marketing area of the Order to include northern New Jersey as well as some parts of upstate New York. Since the date of these amendments, the Order has been known as the New York-New Jersey Milk Marketing Order.

On August 1, 1957, the earliest date such action could be taken, Petitioners instituted proceedings for administra-

tive review, *inter alia*, of Sections 927.83 and 927.84 of the Order. The proceedings were filed pursuant to the administrative remedy provided by Section (15)(A) of the Agricultural Marketing Agreement Act. The disputed sections would require Petitioners to make "compensatory payments", or "penalty" payments, computed as the difference between Class I-A (highest class price) and Class III (lowest class price) prices, for the privilege of serving their customers in the Phillipsburg, New Jersey area. These payments were to be made to the Producer Settlement Fund for distribution to other producers.

An independent Hearing Examiner, expert in Marketing orders, after full hearing and consideration of the facts and law involved, filed his Recommended Report invalidating the compensatory payment provisions. Exceptions to the Report were filed by the Secretary of Agriculture, and following argument before the Secretary's Judicial Officer, the questioned provisions were ruled valid and lawful.

Petitioners appealed to the United States District Court for the Eastern District of Pennsylvania, pursuant to the judicial remedy provided by Section (15)(B) of the Act. The cause was argued before Judge Clary of that Court. Subsequently Judge Clary wrote an Opinion and Order, declaring that Sections 927.83 and 927.84 violate the uniformity clause of Section 8c(5)(A) of the Act. As found by the Hearing Examiner in his Recommended Report, which finding was not overruled by the Judicial Officer, the District Court determined that milk for fluid usage could not be purchased in this area at the Class III price and the price which, when added to the compensatory payment required of them constituted an acquisition cost to the Petitioners consistently and substantially higher than the costs of their competitors for milk sold into the marketing area. It was not contended by the Government at any stage of these proceedings that the cost to Petitioners for milk sold in the marketing area was uniform or substantially equal to that of their competitors fully regulated by Order No. 27.

During the pendency of the (15)(A) proceeding, the Sec-

retary of Agriculture moved against Petitioners in an enforcement action to compel their compliance with the Order pending the ultimate administrative and judicial determination of the (15)(A) and (15)(B) proceedings. Judge Clary's injunctive order requires Petitioners to file reports with the Market Administrator of Order No. 27, and as suggested by Petitioners to the District Court, to pay compensatory payments into the Registry of the District Court. Accordingly, all such payments have been and are currently being made into the Registry of the Court. Petitioner Lehigh Valley Cooperative Farms, Inc. has paid into the Registry of the Court to date $577,749.48; Petitioner Suncrest Farms, Inc., $99,862.73.

Subsequent to September 1, 1958, because of a ministerial change in the wording of the Order to become effective September 1, 1958, the Government petitioned the District Court to amend its former Order. The petition was denied.

The Secretary of Agriculture appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. The case was argued and the decision of that Court written by Judge McLaughlin, as of February 20, 1961, reversed the District Court. Petitioners filed an application for a Re-hearing, which was denied by the Circuit Court on March 10, 1961. The Circuit Court in no way disturbed the Findings of Fact of the Hearing Examiner or the District Court. The posture of this case, as presented to this Court, is that your Petitioners, under the Order and under the decision of the Circuit Court, are required to pay prices for milk substantially in excess of those required of their fully regulated competitors.

## Reasons for Granting the Writ

### I. The Decision of the Court Below Conflicts With the Applicable Decision of the Court of Appeals for the Second Circuit.

The decision of the Court below is in direct and total conflict with the Decision of the Second Circuit in the case

of *Kass v. Brannan*, 196 F. 2d 791, cert. denied 344 U. S. 891. The questions in this case are precisely the same as in the *Kass* case, except the Third Circuit found that the instant case presented a stronger case for uniformity, if uniformity was required, than did the *Kass* case. See footnote 5 of the Opinion of the Court below, Appendix, page 38. In both cases, the same words of the same sections of the statute are involved. The provisions of Federal Order No. 27 in both cases were substantially the same, although designated by different numbers. The provisions requiring compensatory payments in the instant case will be found in our Appendix, page 26. The District Court held that the provisions were substantially the same.[1] The Third Circuit in no way differed with the District Court in this regard.

The Second Circuit, in the *Kass* case, held that "uniformity", as that word is used in Section 8c(5)(A) of the statute involved, prohibited a provision requiring non-pool handlers to pay more for milk of the same use than pool handlers. It further held that Section (7) (D) could not fur-

[1] In answer to a query of the District Court, counsel for the Secretary stated that the difference in the compensatory payment provisions of Federal Order No. 27 as they exist under the *Kass* case and under the instant case, was merely to this effect: that in the *Kass* case, if the Administrator determined that there was an inadequate supply of "cream or condensed milk" the compensatory payments would not be required for a period of time. In the instant case, the compensatory payment provision provides that if Class III milk is less than 15% of the combined Class I-A and Class II, the compensatory payment provision will not apply; location differentials are provided for in the instant case; and it established a different compensatory payment provision for milk beyond the 425 mile zone. These changes are not basic, but merely incidental and in no way change the basic principal of law here involved. *The District Court did not find that these changes were of sufficient importance to change the law as announced in the Kass case. The Court below did not deal with these changes at all, but flaty held that the Kass case was wrong. Implicit in both decisions is the fact that neither Court found any distinguishing features of substance between the two compensatory payment provisions.*

nish such authority since such a requirement would be inconsistent with the "terms and conditions" spelled out in Section 8c(5)(A). Appendix, page 23. The Court below, after paraphrasing the Circuit Court's decision in the *Kass* case, said: "We cannot agree with the holding." Appendix, page 36. In the Second Circuit, Judge Swan wrote the Opinion, Judge Augustus Hand concurred. A dissenting Opinion was written by Judge Learned Hand. It is noteworthy that in the dissent, after discussing one method of obtaining uniformity which Judge Learned Hand discarded as not being practicable, he then turned to the provisions of Order No. 27 establishing compensatory payments, which are virtually the same provisions that appear in the instant case, and stated regarding uniformity: "The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground * * *."

The court below did not follow the reasoning of either the majority opinion or the minority opinion, but squarely disagreed with the decision in the *Kass* case.

The basic factual premise common to both the instant case and the *Kass* case is that Petitioners, like Kass, paid more (initial cost plus compensatory payments) than pool handlers for milk of the same use sold in the marketing area. This was a substantial amount. The fact of such higher cost to Petitioners was found by the Hearing Examiner in his Report, and not overruled in this respect by the Judicial Officer. The District Court in its Opinion made a like finding. No contrary finding was made at any stage of these proceedings; the Government never contested such finding.[2] The corresponding disparity of costs to handlers

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[2] The District Court said: "The government cannot argue, (nor has it attempted to argue that the total cost to the plaintiffs of the liquid milk which they sell in Northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the

present in the *Kass* case was somewhat less. The Court below is in conflict with the *Kass* case in its opposite holding on the same fundamental facts.

The undisputed facts of the (15)(A) proceeding showed that the Pennsylvania Milk Control Commission by authority of the Pennsylvania Milk Control Law, Act of April 28, 1937, P. L. 417, fixed a price for milk purchased in Pennsylvania and sold out-of-state, including the area here involved, at a substantially higher price than would have been required under Federal Order No. 27.[3] *Milk Control Board of the Commonwealth of Pennsylvania v. Eisenberg Farm Products,* 306 U. S. 346, 352-353.

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total cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said § 608c (5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*"

[3] At pages 59 and 60 of the (15)(A) hearing record of the Suncrest case, Petitioner stated the facts clearly, as follows:

> ". . . For the month of August, Mr. Daniels, the price would have been, adding the 'compensatory' payments on top of the Class I price that we are obligated to pay under the Pennsylvania Milk Control Commission rulings, would amount to $8.85 a hundredweight, or bringing it down more specific, to 5¾ cents a quart more than our competitors who might be operating under the New York pool . . . 'compensatory' payment for the month of August amounted to $2.65.
>
> "Daniels: That being the difference between the Class I-A and the Class III price?
>
> "Yohonic: In the month of September the price was increased in the Pennsylvania regulations to $6.40. 'The compensatory' payments were $2.78 plus, bringing it to a total of $9.18 a hundredweight. The Class I price under Order 27 at that time was $5.83.
>
> "Daniels: How much . . .?
>
> "Yohonic: . . . six cents . . . It is obvious that it is impossible to continue . . . business when you must pay such a tribute in order to cross the river and do business in an area that you have been doing business for 10 years, in our instance, and as much as 30 years in some other instances."

The acquisition cost of milk to Lehigh Valley Cooperative Farmers during the year considered in the promulgation record was likewise substantially higher than it would have been required to pay under Federal Order No. 27. See page 309a of the printed record.

Adding the compensatory payments to the costs as found by the Hearing Examiner and the District Court or to the Pennsylvania Milk Control Commission price would take the cost to Petitioners so high that it would be impossible to remain in the market that they have historically served for 15 years in the case of Sunerest and 25-30 years in the case of Lehigh Valley. The Third Circuit held the required excess payments valid. This presents a very serious conflict with the doctrine of the *Kass* case. The part of the marketing area which Petitioners have served over this period of time is part of the metropolitan and commercial area of Allentown, Bethlehem and Easton, Pennsylvania, and Phillipsburg, New Jersey. Phillipsburg lies just across a short bridge joining it with Easton.

The Court below rests its decision on subsection (7)(D) of the statute. The *Kass* decision followed the case of *United States v. Rock Royal Co-Op.*, 307 U. S. 533. This is the leading case in the field of Federal Milk Marketing Orders issued pursuant to the statute here involved. This Court, in that case, held that subsection (7)(D) was merely auxiliary and must conform to the standards definitively set out.[4]

This Court again, in the case of *Brannan v. Stark*, 342 U. S. 451, had occasion to deal with the sections of the statute here involved, and the reasoning in that case was the same as this Court announced in the *Rock Royal* case. It was held by this Court that the Secretary cannot find au-

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[4] At pages 575 and 576, the Court said: "The terms of orders are *limited to the specified provisions minutely set out in sections 8c(5) and (7)*. While considerable flexibility is provided by Section 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified." (Emphasis added.)

thority for any substantial and basic provisions under subsection (7)(D).[5] The Second Circuit, in the same case, 185 F. 2d 871, announced the same principles.[6]

This Court, in the *Rock Royal* case, *supra*, noted that Congress fashioned this statute in more detail than the National Industrial Recovery Act. The Congress, following the decision in the case of *Schechter et al. v. United States*, 295 U. S. 495, in amending the Agricultural Marketing

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[5] "Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to • • • the terms and conditions specified in subsections (5), (6) and (7)'. Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." *Brannan v. Stark*, 342 U.S. 451, 462.

[6] "Whether the power to provide this payment to cooperatives is 'incidental' depends, of course, upon the meaning of that word as used here. The definition given in decisions has varied according to the situation and the statute or instrument to be construed (20 Words and Phrases, pp. 418-434). Probably as good a definition as any, in our situation, is 'Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted' (*First National Bank v. State of Missouri, etc.*, 263 U.S. 640, 659, 44 S. Ct. 213, 216, 68 L. Ed. 486). By such definition, this payment is not authorized to carry into effect the powers granted the Secretary under the Act but is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act.

"That this payment is not 'not inconsistent' is determined by what has last been above stated." *Brannan v. Stark*, 185 F2d 871, 882.

Agreement Act, stated through Senate Report No. 1011, that the Act was being amended to conform to the principles set out in the *Schechter* case.[7]

The decision of the Court below in the instant case is not only squarely in conflict with the decision of the Second Circuit in the *Kass* case, but is in conflict with the decisions of this Court in *Rock Royal* and *Brannan v. Stark, supra.*

An analysis of the specific terms permitted to be included in a milk order set forth in Section 8c(5) will disclose none to which the contested compensatory payment provisions can be auxiliary. In fact, the disputed provisions are in direct conflict with the uniformity class price requirement set forth therein.

A provision to be valid under Section 8c(7)(D) must be both incidental to and *not inconsistent* with the major terms specified in Section 8c(5), and it was for the breach of this basic requirement that the Court in the *Kass* case refused to validate the contested provisions since they, in fact, violated the uniformity provision set forth in Section 8c(5).

Nor do the disputed order provisions comply with the conjunctive "necessary" clause of Section 8c(7)(D). The record shows that the price of milk available to non-pool handlers in this area is higher than the New York Order blend price. Consequently, the rate of compensatory payment set forth in the contested provision is much in excess of that which would be "necessary" to equalize the milk costs of pool handlers and non-pool handlers.

It is, therefore, apparent that the provisions here under

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[7] "To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al. v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, and specify the terms which may be included in orders dealing with the enumerated commodities." 74th Cong. 1st Sess., May 3, 1935, Cal. Day July 13.

attack derive no validity from Section 8c(7)(D) of the Act.[8]

The decision of the Court below conflicts with the *Kass* decision in another substantial regard. The Second Circuit interprets the word "producers" as used in Section 8c(5)(A) to include any and all dairy farmers who supply milk, and makes no distinction between producers who ship to a pool plant and those who ship to a non-pool plant.[9] The Second Circuit likewise made no distinction between pool handlers and non-pool handlers, but treated the word "handlers" as used in Section 8c(5)(A) as including all handlers. There is no distinction in the statute between pool and non-pool handlers. The requirement is that the class prices fixed shall be uniform as to *all* handlers. In fact, the Secretary, in Order No. 27, Section 927.7, defines "handler" to include both pool and non-pool handlers. Appendix, page 26. It will be seen from this definition that your Petitioners are handlers, not only as that term is used in Section 8c(5)(A) of the statute involved, but also by the very definition of the Secretary in the Order here involved. Even the Secretary recognized the intent of Congress to use the word handler to include both pool and non-pool handlers. The Secretary, in Section 927.6, defined "producer" in a more limited way, stating that he is a dairy farmer whose milk was delivered to a pool plant. Appendix, page 26. With this definition the Second Circuit, as heretofore pointed out, did not agree. The Secretary defined, in Section 927.5, a dairy farmer as one who produces milk. Appendix, page 26.

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[8] Judge Clary of the District Court said in his Opinion:

"The plaintiffs, as already pointed out, take the position that since compensatory payments are in fact inconsistent with section 608c(5)(A) of the Act, they are not authorized by section 608c (7)(D). With this we agree. *Kass v. Brannan*, supra. . . ."

[9] In the *Kass* case, at page 795, the Court said: "• • • the Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market".

The Second Circuit likewise did not agree with this distinction.

The Court below in the instant case concluded in speaking of Section 8c(5)(A) that "* * * its only valid construction is *that its application is limited to all pool or fully* regulated handlers * * *". Appendix, page 40.

Since the Order which the Court below sustained provides that only dairy farmers shipping to a pool plant are "producers", the others being merely "dairy farmers" who produce milk, we then have another sharp conflict between the instant case and the *Kass* case. The conclusion of the Court below that the Act demonstrates a legislative intent to distinguish between *pool* handlers and *non-pool* handlers, when the word "handlers" is used, is manifestly impossible inasmuch as the concept of *pool* and *non-pool* handlers postdates the passage of the Act by a considerable period, and was supplied by the Secretary of Agriculture and his subordinates. If the Opinion of the Court below is to prevail, then the word "handlers" appearing in Section 8c(5)(A) is synonymous with the words "pool handlers". In that event, and on this premise, a non-pool handler is not subject to any type of regulation, inasmuch as the statute would then not deal with non-pool handlers. It is obvious from the reading of the statute that Congress meant the word "handlers" to cover all types of handlers. This conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture under the Act of 1937, as amended, depends upon the intent of Congress as expressed in said Act, or whether it depends upon the views of the Secretary as to the desirability of his action. The Court in the *Kass* case, and this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra*, searched for and determined that which Congress intended. The Court below in the instant cases seemed to be more persuaded by the desires of the Secretary.

In the case of *Stark v. Wickard*, 321 U. S. 288, at page 289, this Court speaks of "farmers producing milk" or "dairy

farmers" as producers. When the case again came before this Court in the case of *Brannan v. Stark, supra*, involving the very same litigants, at page 453, this Court again in speaking of the moving parties, used the words "producers", "farmers" and "dairy farmers" interchangably.

In the *Rock Royal* case, *supra*, at pages 543-546, where this Court quotes Sections 1 and 2 of the statute here involved, it spoke of farmers by using the term "producers" even though the statute in those sections used the word "farmers". It is evident that Congress made no distinction between dairy farmers who ship milk either to pool or non-pool handlers. The Opinion of the Court below, if correct, would exclude from the operation of the statute all non-pool handlers and all producers who ship to or supply non-pool handlers. That being so, the Secretary could exercise no regulation, control or supervision over them. Your Petitioners do not claim such an exclusion. They do contend, however, that such regulations as may be promulgated by the Secretary of Agriculture shall be uniform as to prices and costs. The *Kass* case so held; the Court below flatly disagreed. The Court below, as previously stated, has decided a Federal question of statutory interpretation in a way which conflicts with the applicable decisions of the cases heretofore cited.

The decision of the Court below in the instant case converts the auxiliary provision, subsection (7)(D), into a basic provision. This is contrary to the *Kass* decision which held that the compensatory payment provision was "inconsistent with the terms and conditions specified in Section 8c(5)(A) and, therefore, cannot be justified under Section 8c(7)(D)". There the Court recognized that Section 8c(7)(D) was purely auxiliary, as this Court held in the cases of *Rock Royal* and *Brannan v. Stark, supra*. The imposition of a compensatory payment is the exercise of a very substantial and real power. Under the decision of the Court below, the Secretary could impose compensatory payments at such a level, as actually done in the instant case, to drive all non-

pool handlers completely out of a market, even though they had been there for many years, and even though the prices paid by them for the milk sold in the area in the same use classification were substantially higher than required of pool handlers by Order No. 27. This was characterized by the Court in the *Kass* case as imposition of penalties. If the Secretary can use subsection (7)(D) for this very basic purpose of fixing prices, there are no standards and no course is charted which he must follow. The action of the Secretary, if the Court below is correct, amounts to preemption of the market for the pool handlers and pool producers, and away from non-pool handlers and their producers, even though the non-pool handler has no competitive price advantage. The Court, in the *Kass* case, recognized that compensatory payment provisions are part of the "minimum price" fixed by the Secretary, as that phrase is used in Section 8c(5)(A).

The decision of the Court below conflicts with the holdings of this Court, to the effect that basic questions of statutory delegation of power must be resolved before reliance on findings of necessity made by an administrative agency. If statutory authority is lacking, the administrative agency should present the matter to Congress.[10] See *Regents of University System of Georgia v. Carroll*, 338 U. S. 586, 600; *Addison v. Holly Hill Fruit Products*, 332 U. S. 607; *F. C. C. v. American Broadcasting Co.*, 347 U. S. 284.

We turn now to the question of administrative difficulties. This question was passed upon also in the *Kass* case. It was

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[10] In *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498, at pages 515, 516, the Court said: "If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

In the case of *Denver Union Stock Yard v. Producers L. M. Association*, 356 U. S. 282, the Court said: ". . . If the Act does not fit the present economics of the business, a problem is presented for the Congress." . . .

held in the *Kass* case that there was no evidence of administrative inconvenience in determining what was actually paid by the non-pool handler upon whom the compensatory payment was impressed. The Court held that if there had been such a showing, a slight disparity might be justified, but in the case where no administrative inconvenience was shown, "• • • any discrimination in price is contrary to the requirement of uniformity". In the instant case, there is no evidence of inconvenience or difficulty whatsoever in determining what was paid by your Petitioners to the "dairy farmers" or "producers" who supplied them with milk. In compliance with the order of the District Court, your Petitioners file monthly reports with the Market Administrator, setting forth the amount of milk received by them, and the disposition of such milk both as to where sold and its use classification. They also file with the Pennsylvania Milk Control Commission monthly reports setting forth the same information. The Administrator of Order No. 27 and the Pennsylvania Milk Control Commission audit the records of your Petitioners periodically in order to verify the reports. It can be easily determined during these audits what the actual payments were to those supplying milk. Hence, under the *Kass* decision, no discrimination whatsoever can be justified, but under the decision of the Court below in the instant case, there is no restraint on the amount of discrimination that can exist by virtue of the Order.

The Court below did not in any regard attempt to distinguish the instant case and the *Kass* case. It definitely and flatly disagreed with the reasoning of the decision in the *Kass* case in every regard. Had it been a Court of superior jurisdiction, the Second Circuit would have been overruled.

## II. The Case Involves a Substantial Federal Question of General Importance.

The United States Secretary of Agriculture has promulgated, and there now exist, seventy nine (79) Federal

Orders throughout the United States, many of which contain various compensatory payment provisions. Twenty-six of these Orders recognize that what the non-pool handler pays for milk must be taken into consideration when fixing the amount of compensatory payments required to be paid. Twenty-one of these Orders have compensatory payment provisions similar to the ones here in question. The District Court for Southern Connecticut has held that compensatory payment provisions of Federal Order No. 96, which are similar to the ones here in question, are invalid, while the District Court for Northern Ohio, Eastern Division has found the compensatory payment provisions of Order No. 75, which are similar to the ones here in question, valid. This poses an unsettled question. Until the decision of the Court below held the contested provisions valid in the instant case, the only opinion of an Appellate Court was in the *Kass* case, which held such provisions of the Order invalid.

The 84th Congress, 1st Session, had the statute under consideration. This consideration by Congress was subsequent to the *Kass* decision, and it must be assumed that Congress was cognizant of the interpretation placed upon Section 8c(5)(A) and Section 8c(7)(D) by the Court of Appeals for the Second Circuit in the *Kass* case. By inaction after a hearing before the subcommittee on dairy products, it should be taken as an acknowledgment that the Court in the *Kass* case correctly interpreted the meaning and intent of Congress.

The holding of the Court below is contrary to the general understanding of the purpose of compensatory payments as previously recognized by the Secretary and university authorities.

In the *Kass* Opinion, the Court quotes a Mr. Weldon, a well recognized authority on milk, who appeared as a witness, who said: "* * * to insure that the minimum cost (of non-pool milk, cream, etc.) to handlers is the same as the

regular class price to handlers of milk received at pool plants * * *". In the instant case, there was testimony by Dr. Leland Spencer, Professor of Agricultural Economics, Cornell University, also a well recognized authority in the field of milk marketing and milk regulations, who testified to the same effect as Mr. Weldon. Dr. Spencer recognized the necessity of uniformity and lack of discrimination; he said: "I certainly would not like to see any unnecessary hardship created for any handler or producer. My only concern is that there be established by some proper means an equality of opportunity between those in the pool and under the regulation and those who are not. * * *" This witness was not called by your Petitioners. He also testified that with the Pennsylvania Milk Control Commission functioning as it is, any administrative difficulties would be "helped a lot" from an administrative point of view. Dr. C. W. Pierce, of Pennsylvania State University, likewise recognized as an expert in this field, and not called by your Petitioners, in speaking of uniformity, said: "The purpose, Mr. Daniels, as I see compensatory payments, is to equalize the cost to handlers on milk that is regulated by the order and priced by the order, and comes from order plants, to equalize the cost on milk from other sources that comes into the marketing area for similar uses, particularly Class I." In answer to a question as to whether compensatory payments should have the function of guaranteeing to any group of producers the Class I market, Dr. Pierce said: "No. The compensatory payment that I suggested, that we have suggested, is not for the purpose of keeping milk out of the market. * * *"

It is perfectly apparent that no one advanced the theory that uniformity was not required as between pool and non-pool handlers. In fact, the Judicial Officer for the Secretary of Agriculture, in former cases, based his decisions on "equalized costs", and subsequent to the decisions in the instant case he did likewise. However, as to your Peti-

tioners, he departed from that theory. The Court below in the instant case, in contrast to what was done in the *Kass* case, ignored the testimony of Dr. Spencer and Dr. Pierce. The Court likewise ignored the fact that in twenty-six Federal Orders, the Secretary in fixing compensatory payments gives effect to what was actually paid for the milk by non-pool handlers. These include markets as large as Upstate Michigan and Lower State Michigan, including the city of Detroit.

It has been previously pointed out that the prices required of non-pool handlers, substantially in excess of what pool handlers are required to pay for milk of the same use and sold in the marketing area, preempt the market to the producers of the pool handlers and to pool handlers, and drive the non-pool handlers from the market. This prohibits the flow of milk from one production area into a given marketing area. This is in violation of Section 8c(5)(G). In the case of *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, the Court held that "From the language of the provision and its legislative history, the term 'prohibit' has application to both milk and milk products, but the term 'in any manner limit' has application only to milk products." *From what has gone before in this Petition, it is evident that 5 to 6c a quart penalty required to be paid by your Petitioners, over and above that required to be paid by competitors, would prohibit their participation in this marketing area where milk wholesales and retails from 24½c to 28c per quart, and the profit to all handlers or to any handler is far less than 5 to 6c a quart. The Secretary is not authorized by the statute to do by indirection what Congress did not permit him to do directly.*

## III. A Constitutional Question Is Presented.

If the Opinion of the Court below is to prevail, i.e., Section (7)(D) authorizes the imposition of compensatory payments without regard to the "terms and conditions"

set out in Section 8c(5)(A), the section would then become unconstitutional. Such an interpretation would be an illegal delegation of legislative authority and a violation of Article I, Section 1 of the Federal Constitution. The *Schechter* case, *supra*, struck down the National Industrial Recovery Act as a violation of the Constitution in this respect. The statute here involved was amended to comply with the decision in the *Schechter* case. This Court has consistently held that authority delegated to an administrative or executive agency must contain standards or chart a course to be complied with or followed by the Secretary. This Court, in the *Rock Royal* case, *supra*, distinguished the present statute from the N.R.A.[11] It is the duty of the Court to give a constitutional interpretation to the statute or any section thereof, if the words of that statute or section will permit. If Section (7)(D) is to be given a constitutional interpretation, it must be interpreted as authorizing only such provisions as comply with the "terms and conditions" set out specifically in the other sections of 8c(5). The *Kass* case so interpreted the section, as did this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra.*

## IV. The Decision of the Court Below Is Erroneous.

For the many reasons set out in the previous topics, the decision of the Court below is erroneous, in the following respects:

1. It ignores the mandatory "terms and conditions" of Section 8c(5)(A) requiring uniformity.

2. It limits the word *handlers to pool handlers, and limits the word producers to dairy farmers shipping*

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[11] "Unlike the language of the National Industrial Recovery Act condemned in the A. L. A. Schechter Poultry Corp. Case (295 U.S. page 538, 79 L. ed. 1584, 55 S. Ct. 837, 97 A.L.R. 947), the tests here to determine the purpose and the powers dependent upon that conclusion are defined."

*milk to pool handlers.* This amounts to adding words to the statute that do not appear therein.

3. It gives to Section 8c(7)(D) an interpretation which renders such section unconstitutional.

4. It validates a provision of Order No. 27 which is in direct violation of Section 8c(5)(G) of the Act.

## Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

### Statute Involved

MILK AND ITS PRODUCTS; TERMS AND CONDITIONS OF ORDERS.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers*, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers

of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and

security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contracts between the association and its producers; *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * * *

TERMS COMMON TO ALL ORDERS.

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * * *

(D) Incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

## APPENDIX B

### Order Involved

Sec. 927.5 *Dairy farmer.* "Dairy farmer" means any person who produces milk.

Sec. 927.6 *Producer.* "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

Sec. 927.7 *Handler.* "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

Sec. 927.83 *Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided,* That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a

Appendix B—*Continued*

plant from which milk specified in Sec. 927.65 (h) (2) or (3) was received from the handler's own farm.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this subpart: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the

location of the plant at which the nonpool milk was originally received from farmers: *Provided,* That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

(3) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b)(9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Provided,* That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

(4) For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph

shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

(5) In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided,* That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

Sec. 927.84 *Payments on milk or milk products the source of which is not established.* Payments shall be made by handlers to producers through the producer settlement

Appendix B—*Continued*

fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk which milk or milk product meets each of the conditions specified in subparagraphs (1) and (2) and, if applicable, subparagraph (3) of this paragraph:

(1) It was derived from milk for which the farm source is not established.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant.

(3) If first found at a nonpool plant, the milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk is subject to the fluid skim differential.

(b) The amounts of payment for the product set forth in paragraph (a) of this section shall be as follows:

(1) For milk, concentrated fluid milk, fluid milk products, or cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the value of such milk, fluid milk products, cultured or flavored milk drinks, or the milk equivalent of such concentrated fluid milk at the class price at the plant where first found.

(2) For cream, half and half, fluid cream products, or cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent of butterfat, the value of the milk equivalent of such product at a rate per hundredweight computed pursuant to Sec. 927.40 (d)(1) adjusted by the differentials set forth in column C in the table in Sec. 927.42 for the zone of the plant at which first found.

(3) For skim milk in a form subject to the fluid skim milk differential, the value at a rate per hundredweight computed as follows: divide the amount computed pursuant to Sec. 927.40 (d)(2) by 0.9125. add an amount computed pursuant to Sec. 927.44,

Appendix B—*Continued*

and adjust the result by the differential set forth in column B in the table in Sec. 927.42 for the zone of the plant where first found.

(4) For skim milk in a form not subject to the fluid skim milk differential, the value at a rate per hundredweight computed as follows: divide the amount computed pursuant to Sec. 927.40 (d)(2) by 0.9125.

(5) In computing the milk equivalent value of products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph.

(1) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(2) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(3) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

## APPENDIX C

### Opinion of the United States Court of Appeals for the Third Circuit

(Filed February 20, 1961)

By McLaughlin, *Circuit Judge.*

The prime issue presented by these appeals is whether certain provisions of New York-New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 *et seq.*, (hereinafter referred to as Order No. 27), requiring all non-pool handlers of milk, to make a "compensatory payment" to the Producers Settlement Fund for all non-pool fluid milk distributed by them in the marketing area, 7 C.F.R. §§ 927.83, 927.84, contravenes the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 601 *et seq.*

Docket No. 13,289, is an enforcement action brought by the United States pursuant to § 8a (6) of the Act, U. S. C. § 608a (6), to require Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., to make the compensatory payments required by the order. Dockets Nos. 13,290 and 13,291, are actions by the Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., respectively to obtain judicial review of decisions of the Judicial Officer in the United States Department of Agriculture pursuant to § 8c (15) of the Act, 7 U. S. C. § 608c (15) (B). The Judicial Officer held that the contested provisions for compensatory payment were valid.

In the district court, all three actions were consolidated for trial.[1] In its opinion reported in 183 F. Supp. 80 (1960),

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[1] In Docket No. 13,289, pending final outcome of the cases, the district court ordered that the compensatory payments be paid into the registry of the court, and enjoined Lehigh from further violating Order No. 27.

Appendix C—*Continued*

that court, although finding the provisions for compensatory payments supported by the record and "incidental to • • • and necessary to effectuate the other provisions of such order," invalidated them under the authority of the majority holding in Kass v. Brannan (Judge Learned Hand dissenting), 196 F.2d 791 (2 Cir. 1952).[2] The court noted however:

> "Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret § 608c (5), we do not feel justified in now rejecting the interpretation there placed upon § 608c (5) (A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight."

The primary policy of Congress in enacting the Federal Milk Control program and particularly Order No. 27, applicable in the case at bar,[3] was "• • • to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices • • •." 7 U. S. C. § 602 (1) (1952). Regarding milk, the plight of the farmers (referred to as producers in the milk industry) was caused by the fierce competition to procure the most lucrative market for it. Since fluid milk brought the highest

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[2] Specifically the district court stated:

> "• • • in light of the Kass v. Brannan decision, *supra*, the Order as promulgated did not comply with Section 608c (5) (A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producers Settlement Fund by them must be stricken down."

[3] For a more detailed discussion of the Order and the problems of the milk industry, see Nebbia v. New York, 291 U. S. 502 (1934); United States v. Rock-Royal Co-op., 307 U. S. 533 (1933).

Appendix C—*Continued*

return to the producer and cream or milk product utilization was less rewarding, the rivalry was for that market. To alleviate the harsh effects of that struggle on producers, Congress enacted the governing law vesting the Secretary of Agriculture with broad regulatory powers. Pursuant to the statutory authorization, the Secretary of Agriculture has promulgated regional milk orders based on a system of milk pooling. Those orders, with their programs of classification and reporting are geared to provide the producer in the specified marketing area with a uniform price for all milk delivered by him for processing, irrespective of the particular use to which it is ultimately put.

This is accomplished by the following method. Under Order No. 27 milk utilization is classified into three fundamental groups: Class I (fluid milk); Class II (cream); Class III (milk products, butter, cheese, etc. * * *). The Market Administrator fixes a price for each class. He then determines from reports filed by the handlers the volume of milk used in each classification throughout the marketing area. From those figures, the Administrator computes the value of all milk used in the Marketing Area by multiplying the market volume figure in each class by the class price. After adding the totals and making certain additions and/or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area, to determine the uniform blend price which is paid to all producers, regardless of the utilization of their milk. Since each handler's use of the milk received from producers would not average out to the uniform blend price, a Producers Settlement Fund was created. This fund is contributed to by those handlers whose total class utilization price of the milk exceeds the uniform blend price and is drawn upon by those handlers whose total class utilization price of the milk is less than the uniform blend price. Thus although the producer receives the uniform blend price regardless of the utilization

of his milk, the handler must account to all other handlers through the Producers Settlement Fund for the price of his actual use of the milk purchased by him.

Lehigh and Suncrest are not fully regulated handlers, the largest part of their milk business being outside the marketing area. However, since a certain percentage of their outlets for milk (approximately 5%) are in the marketing area, they are subject to the compensatory payment provisions of Order No. 27, 7 C. F. R. §§ 927.83, 927.84, which provide that where a non-pool handler distributes milk for Class I utilization in the marketing area, he must pay into the Producers Settlement Fund a compensatory payment measured by the difference between the Class I and Class III price.

Lehigh and Suncrest attacked this provision and were sustained by the district court on the authority of Kass v. Brannan, *supra*. That case held that mandatory compensatory payments imposed upon non-pool handlers for fluid milk distributed in the marketing area were, "* * * inconsistent with the terms and conditions specified in section 8c (5) (A) * * *." That section reads as follows:

"Milk and its products; terms and conditions of orders.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk pur-

> chased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

To reach its conclusion, the court in Kass compared the cost of the milk to pool handlers with that of non-pool handlers. It stated that although the cost to a pool handler is the class price, a non-pool handler's cost is composed of two items, the amount it pays the seller and the amount of the compensatory payment. The court decided that since the payment is based on the difference between two class prices without taking into account the initial cost to the handler, the result is a disparity between the non-pool handler's total cost and the pool handler's total cost which violates the uniformity provision of Section 8c (5) (A) of the Act. We cannot agree with the holding.[4]

The *Kass* opinion assumes that the minimum class price provision of Section 8c (5) (A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:

> "The result sought to be achieved by Congress in this section [8c (5) (A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage." (Emphasis supplied).

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

Section 8c (5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated

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[4] We note that a recent case in the District Court of Connecticut, Knudsen Brothers Dairy, Inc. v. Benson, Civil No. 8145 (D.C. Conn. July 19, 1960), followed the mandate of its circuit as set forth in the *Kass* opinion. As it adds nothing to the conclusion in Kass it will not be discussed.

handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U. S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F.Supp. 66, 73 (N.D.Ohio 1960).

Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the *Kass* formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the *Kass* case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

It is evident that in all three illustrations, employment of the *Kass* theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments

provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.[5]

We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: "Such price shall be uniform as to all handlers," guarantees them a cost equal to that of pool handlers.[6] But there is not the slightest

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[5] Examination of the *Kass* opinion on its own facts reveals that Kass was a *handler* who purchased cream and condensed milk from another handler. Pursuant to Section 927.9(h) of Order No. 27, Kass was charged compensatory payments on the cream measured by the difference between the Class II-A and Class IV-A price and on the condensed milk measured by the difference between the Class II-B and Class IV-A price. Clearly Section 8c (5) (A) has no application in such a situation. It only contemplates minimum class prices which *handlers* shall account to the pool for on milk purchased from *producers*. It makes no reference to situations where *handlers* purchase milk from other *handlers*. Even if it could be said that it was designed to limit the imposition of compensatory payments at all, and we hold that it was not, it would be applicable solely to handler-producer transactions, and not to handler-handler transactions. Lawson Milk Company v. Benson, 187 F.Supp. 66, 70-71 (N.D.Ohio 1960); see also, dissenting opinion of Judge Learned Hand in Kass v. Brannan, 196 F.2d at 799.

[6] As a matter of statutory construction if we were to adopt the theory of Lehigh and Suncrest and thereby include non-pool producers within the ambit of the term "producers" in Section 8c (5) (A), the provisions of the next section, 8c (5) (B), which requires payment of the uniform blend price to "producers", would

indication that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan. "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole."[7] This was acknowledged early in the history of the Act by the Supreme Court when it held that agency cooperatives were subject to the Act even though they did not technically purchase the milk of their producers. United States v. Rock Royal Co-op., 307 U. S. 533 (1938). See also Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 95 (8 Cir. 1946).

The Act does not attempt nation-wide regulation, but rather "• • • authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable." United States v. Rock Royal Co-op., *supra* at 576. "The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions." Bailey Farm Dairy Co. v. Anderson, *supra* at 90. This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the

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also be applicable to Lehigh and Suncrest. In effect, the Market Administrator would have the choice of either imposing full regulation on Lehigh and Suncrest or no regulation at all. So limiting the discretion of the Market Administrator is inconsistent with the tenor of the entire act and contrary to the accepted judicial interpretation of its terms. See, e.g., Queensboro Farms Products v. Wickard, 137 F.2d 969, 977 (2 Cir. 1943); Bailey Farm Dairy Co. v. Anderson, 157 F.2d 87, 94-95 (8 Cir. 1946).

[7] Frankfurter, J., in Stark v. Wickard, 321 U. S. 288, 311, 315 (1944) (dissenting opinion).

Appendix C—*Continued*

letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must account to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.[8]

The aim of Section 8c (5) (A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c (5) (B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act, stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

The final contentions of Lehigh and Suncrest are that the provisions for compensatory payments are not allowed

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[8] Although admittedly Lehigh Valley Cooperative Farmers, Inc., is subject to another milk order, as we view Section 8c (5) (A) that has no bearing on its position concerning sales in the Order No. 27 area.

by the Act and not supported by the record. As we have stated previously, the district court found the provisions "incidental to • • • and necessary to effectuate the other provisions of such order" under Section 8c (7) (D) of the Act and also found the provisions supported by the record. We agree with the district court's conclusion, 183 F.Supp. at pp. 89, 90. See also Lawson Milk Company v. Benson, *supra*, at pp. 72, 73.

The judgment of the district court will be reversed and the proceedings remanded to that court with instructions (1) to affirm the ruling and decision of the Judicial Officer in Lehigh Valley Cooperative Farmers, Inc. v. Benson, No. 13,290, and Suncrest Farms, Inc. v. Benson, No. 13,291; and (2) to issue an injunction as prayed for in the complaint in United States v. Lehigh Valley Cooperative Farmers, Inc., *et al.*, No. 13,289 to require the appellees to comply with the terms of §§ 927.29(d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay to the Market Administrator the money in the registry of the district court in this proceeding.

## APPENDIX D

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,289

UNITED STATES OF AMERICA,
*Appellant,*

vs.

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,
*Circuit Judges.*

### Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded with instructions to issue an injunction as prayed for in the complaint to require the defendants to comply with the terms of 927.29 (d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay the Market Administrator the money in the registry of the District Court in this proceeding.

Attest:

IDA O. CRESKOFF
Clerk

February 20, 1961

## APPENDIX E

## UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,290

LEHIGH VALLEY COOPERATIVE FARMERS

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
*Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,
*Circuit Judges.*

### Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

Attest:

IDA O. CRESKOFF
Clerk

February 20, 1961

## APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,291

SUNCREST FARMS, INC.

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,

*Appellant*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: McLAUGHLIN, HASTIE AND FORMAN,

*Circuit Judges.*

### Judgment

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the proceedings remanded with instructions to affirm the ruling and decision of the Judicial Officer.

Attest:

IDA O. CRESKOFF

Clerk

February 20, 1961

## APPENDIX G

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,289

UNITED STATES OF AMERICA,
*Appellant*

vs.

LEHIGH VALLEY COOPERATIVE FARMERS and SUNCREST FARMS, INC.

No. 13,290

LEHIGH VALLEY COOPERATIVE FARMERS

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
*Appellant*

No. 13,291

SUNCREST FARMS, INC.

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America,
*Appellant*

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until April 14, 1961.

Dated: March 15, 1961

McLAUGHLIN
*Circuit Judge*

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MAY 16 1961
JAMES R. BROWNING, Clerk

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., and SUNCREST FARMS, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondents*.

## BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

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No. 892

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., and SUNCREST FARMS, INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, and EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondents*.

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## BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Pursuant to Rule 42 (4) of the rules of this Court, the State of Minnesota respectfully tenders this brief, amicus curiae in support of the petition of Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., petitioners herein.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The opinion of the United States Court of Appeals for the Third Circuit is printed in the Appendix herein at page 5a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on February 20, 1961. Jurisdiction of this Court is invoked under 28 U.S.C., § 1254.

## QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq. (hereinafter referred to as the Act), authorizes the Secretary of Agriculture to promulgate marketing orders regulating the minimum price that distributors may pay for milk sold in a regulated marketing area. The terms and conditions that may be included in any milk order are expressly limited by the provisions of 7 U.S.C. § 608c(5) and 7 U.S.C. § 608c(7) (J. A. 1a, 4a). Except as provided in 7 U.S.C. § 608c(5)(D), no marketing order may prohibit or in any manner limit the marketing, in a regulated marketing area, of milk or milk products produced in any production area of the United States. The questions presented are:

1. Whether, under § 8c(5) of the Act, 7 U.S.C. §8c(5), dairy farmers, engaged in the production of milk for sale in a regulated marketing area, may be denied the status of a "producer" and excluded from the benefits of the Act.

2. Whether § 8c of the Act, 7 U.S.C. § 608c, grants the Secretary of Agriculture authority to impose a charge on "nonproducer" milk, prohibiting or limiting the entry into a regulated marketing area of the milk of dairy farmers who produce milk for sale primarily in other marketing areas.

## STATUTES AND ORDERS INVOLVED

1. The Agricultural Marketing Agreement Act of 1937, as amended, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq.

2. 7 C.F.R. § 927.1 et seq., regulating the handling of milk in the New York–New Jersey Federal Milk Marketing Area (hereinafter referred to as Order No. 27).

The relevant provisions of the foregoing statute and regulation appear in the Joint Appendix hereto at page 1a.

## STATEMENT OF CASE

Section 8c(15)(A) of the Act, 7 U.S.C. § 608c(15)(A) permits a handler subject to an order to obtain administrative review thereof before the Judicial Officer of the Secretary of Agriculture. Judicial review of his decisions in the District Courts of the United States is authorized by § 8c(15)(B) of the Act, 7 U.S.C. § 608c(15)(B).

Petitioners instituted review proceedings before the Judicial Officer of the Secretary of Agriculture to challenge the validity of provisions of Order No. 27 requiring "non-pool handlers" to make "compensatory payments" on "nonproducer" milk distributed in the marketing area encompassed by the order. The hearing examiner filed his Recommended Report invalidating the challenged provisions. The Secretary of Agriculture excepted to the Report, and, following

argument before the Secretary's Judicial Officer, the decision of the hearing examiner was reversed and the questioned provisions were ruled lawful.

Petitioners sought judicial review in the United States District Court for the Eastern District of Pennsylvania. On the authority of *Kass v. Brannan*, 196 F. 2d 791 (2nd Cir. 1952), certiorari denied, 344 U.S. 891, the District Court invalidated the challenged provisions, holding that Order No. 27 did not comply with § 8c(5)(A), 7 U.S.C. § 608c(5)(A), and was unauthorized by the Act. That section requires that the prices paid by handlers for each class of milk "shall be uniform as to all handlers."

On appeal by the Secretary of Agriculture, the United States Court of Appeals for the Third Circuit reversed the decision of the District Court, rejecting the holding and reasoning of *Kass v. Brannan*, supra (J. A. 9a).

Under a milk order, handlers (or dealers) pay for milk according to the use for which the handler disposes of it, i.e., according to "use classification." Milk sold for fluid use (Class I milk) has the highest use value; the surplus that cannot be sold in fluid form must be processed into manufactured products (Class III in Order No. 27) and has the lowest use value. The price for each class use is fixed by the Order. The producer supplying the handler, however, is paid neither the Class I nor the Class III price, but rather a "blend" or "uniform" price based upon marketwide pooling of all handlers' receipts and sales in accordance with the provisions of § 8c(5)(B)(ii), 7 U.S.C. § 608c(5)(B)(ii). The "blend" price is derived by multiplying the total amount of milk disposed of by all handlers in the market in all classes by the established price for each

class. The product of that multiplication, divided by the total quantity of milk sold in the market, yields the "blend" or "uniform" price paid to producers located at a fixed distance from the market center. Location differentials above or below the minimum price, (§ 8c(5)(A)(ii)), allow for the cost of transportation to the market. "The purpose of the differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers."[1]

Since § 8c(5)(A) of the Act requires uniformity of class price among handlers, some handlers will pay into a "producer settlement fund" the amount by which their total purchases, classified according to use and multiplied by the price for each class, is greater than that total multiplied by the "blend" price. If, on the other hand, a handler's total volume of milk purchases, classified according to use, when multiplied by each class price, is less than the amount obtained by mutiplying his total receipts by the "blend" price, then the "producer settlement fund" pays such handler the difference to permit him to pay his producers the "blend" price, in accordance with § 8c(5)(C) "to the end that total sums paid by each handler is equal to the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section."

Order No. 27 distinguishes and defines the terms "dairy farmer" and "producer," limiting the latter term to a dairy farmer, engaged in the production of milk for sale in the marketing area and whose milk is delivered to a plant that

[1] *Regulations Affecting the Movement and Merchandising of Milk*, Marketing Research Report No. 98, p. 61 (1955). The price actually received by producers varies inversely with their distance from the market center.

distributes in the regulated area, at least 50% of all milk received from all dairy farmers.[2] Under the terms of the order, only "producers" are entitled to participate in the "producer settlement fund" and, through that device, to receive the "blended" minimum price established in the marketing area.

Dealers who distribute in the regulated marketing area the milk of "nonproducer" dairy farmers are required by § 927.83 of the order to pay a charge on each volume of such milk into the producer settlement fund for distribution among "producers." Petitioners distribute approximately 5% of their total plant receipts in the marketing area, the remainder of their sales being made in contiguous or adjacent areas in Pennsylvania. As a result, the dairy farmers supplying petitions are not "producers" under the definition of Order No. 27.

Petitioners are regulated under Philadelphia Federal Milk Order No. 61 and the Pennsylvania Milk Control Board. Dairy farmers supplying petitioners are paid for their milk at a price equal to or higher than the price fixed by Order No. 27. (See Petition, p. 8.)

The challenged provisions require petitioners to pay into the producer settlement fund for distribution among "producers" a charge or "compensatory payment" measured by the difference between the Class I and Class III price established by Order No. 27, multiplied by the total volume of milk distributed by petitioners in the marketing area regulated by Order No. 27. The amount of the payment represents approximately five to six cents per quart for each quart so distributed. It is designed either to exclude such

[2] Such a plant is referred to as a "pool plant" as distinguished from a "non-pool plant."

milk from the market or to compensate "producers" for the loss of fluid milk sales resulting from the entry of petitioners' "nonproducer" milk.

In *Kass v. Brannan*, supra, the Second Circuit viewed compensatory payments as a means only to protect the price structure of the regulated market against the competitive sales advantage that a handler might obtain by substituting cheaper outside milk. The Court below, in rejecting *Kass*, decided that "stabilizing the producers' market on the regional level" was "the ultimate goal of the Act" (J. A. 13a) and rejected as irrelevant the price paid by petitioners to their dairy farmers. On that assumption, compensatory payments were held valid as an appropriate device designed to retain a market for regional producers against the intrusion of outside dairy farmers.

## INTEREST OF THE STATE OF MINNESOTA

Minnesota ranks second among the states in total milk production.[3] The annual farm cash receipts from marketing of all milk and cream amounted in 1960 to approximately $300,000,000.[4] Of this total production, only about 15% can be consumed within the state as milk, cream, butter, dry milk and other dairy products. The remaining 85% must be marketed in the channels of interstate or foreign trade.

In 1960 dairy farmers in the United States received an average price of $4.17 per hundredweight for all milk and cream marketed.[5] The Minnesota average was $3.07 per

[3] *Milk Production, Disposition and Income*, United States Department of Agriculture, Statistical Reporting Service, April 1961.

[4] Id.

[5] Id.

hundredweight for milk marketed in all forms. While ranking second in terms of total production, Minnesota ranks fifth in terms of gross income from dairying. The disparity may be emphasized by the fact that Florida produces only one-ninth as much milk as Minnesota but receives for that milk almost one-third of Minnesota's total income from dairying.

There are over 35 major markets in the United States where the price of milk for bottling purposes exceeds the price paid by dealers in Minnesota by more than the cost of transportation to those markets.[6] Such markets are not responsive to price competition because of intermarket barriers which take the form of restrictive sanitary regulations, state milk control laws and certain provisions of federal market orders.[7]

Barriers to market entry deny Minnesota milk producers a substantial market for fluid milk and compel the diversion of such milk into lower valued manufacturing uses. Such barriers permit those within the protected area to ignore alternative sources of supply and extract a monopoly price from consumers. The excess production induced by high fluid milk prices within such markets is diverted into manufactured products and dumped onto the national market, thus depressing the value of manufacturing milk.

Federal milk order restrictions such as those challenged here are cumulative in their adverse effect on Minnesota's dairy industry. Similar restrictive provisions, when applied

[6] Fluid Milk and Cream Report, United States Department of Agriculture, March 1961.

[7] See, e.g., *Regulations Affecting the Movement and Merchandising of Milk*, United States Department of Agriculture, Marketing Research Report No. 98 (1958).

to the approximately 80 federal market orders affecting over two-thirds of the total volume of milk consumed in urban areas in this country, restricts the movement of fluid milk between the several production areas of the United States, unduly enhance prices within those protected areas, lower consumption and result, cumulatively, in uneconomic surplus disposal of fluid milk into manufacturing uses.[8]

## REASONS FOR GRANTING THE WRIT

### 1. The decision of the Court below is in direct conflict with a decision of the Court of Appeals of the Second Circuit.

The question in this case is whether certain provisions of the New York–New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 et seq., referred to as Order No. 27, are within the statutory authority granted to the Secretary of Agriculture by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 601 et seq.

The decision of the Court below holds that under the Act, where a dealer handles milk produced by dairy farmers for sale primarily in another market, the Secretary has the power to prevent such milk from entering a regulated marketing area and displacing therefrom the fluid milk sales of the market's "primary producers."

Petitioners' milk, purchased from dairy farmers in Pennsylvania, was paid for in accordance with prices established by the Pennsylvania State Milk Control Commission and Federal Order No. 61. It is undisputed that their acquisi-

[8] M.S.A. § 8.13 (Supp. 1958) directs the Attorney General to combat trade barriers relating to dairy products.

tion cost was equal to or higher than the comparable Class I price paid by handlers to producers in Order No. 27. The Court below held, nonetheless, that the compensatory payment of approximately five and one-half cents a quart required by 7 C.F.R. §§ 927.83, 927.84 was authorized as a measure "designed to compensate the pool for the loss of Class I fluid milk utilization and [to] protect the uniform blend price in the marketing area." (J. A. 10a) With respect to the requirements of § 8c(5)(A) that "minimum prices for each * * * use classification which all handlers shall pay * * * shall be uniform as to all handlers * * *", the Court below said that the section did not require equalized cost "between pool handlers or between pool and nonpool handlers." (J. A. 13a)

In *Kass v. Brannan*, 196 F. 2d 791, (2nd Cir. 1952), certiorari denied, 344 U.S. 891, it was held that the provisions of Order No. 27 imposing "compensatory payments" on a dealer with respect to "outside milk" distributed in the New York marketing area were not authorized by the Act. The Court found that the "penalty", when added to the dealer's actual cost, resulted in a "price discrimination between a handler who purchases nonpool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area." 196 F. 2d at p. 796. Such a lack of uniformity, the Court found, contravened § 8c(5)(A) of the Act.

The Court below squarely rejected *Kass v. Brannan*, stating: "We cannot agree with the holding." (J. A. 9a)

The two decisions adopt inconsistent and irreconcilable views of the purposes of § 8c of the Agricultural Marketing Agreement Act of 1937. Adopting the reasoning of the Third Circuit, only those producers primarily associated with the

regulated marketing area would be permitted to supply it, since the compensatory payment required is measured to result in total exclusion. It assumes that the "ultimate goal of the Act" is to stabilize "the producer's market on the regional level." (J. A. 13a) The *Kass* decision, on the other hand, would exclude "outside" producers' milk from a regulated market only to the extent that its entry would give a handler in the market a competitive price advantage and thus break down the pricing structure established under the Order.

## 2. The case involves a substantial federal question of importance beyond the interests of the parties involved.

Resolution of conflict in the decisions of the Second and Third Circuits is imperative to the proper administration of the Act. The Department of Agriculture has promulgated approximately 80 federal orders affecting over two-thirds of the total volume of milk consumed in urban areas in the United States.

The matter is important beyond the interest of the parties to this case. The public interest in the cost of milk supplies, and the interest of producers in freedom of access to markets requires a decision on the question presented by the petition. Milk marketing arrangements, lawful under the Agricultural Marketing Agreement Act, would be unlawful under the anti-trust laws, but for the exemption provided in § 8b of the Act. *United States v. Borden Co.*, 308 U.S. 188. Absent a lawful federal milk order, it is unreasonable *per se* for milk producers to foreclose competitors by agreement, from any substantial market. *Maryland-Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458.

Where a marketing area is protected either by sanitary or economic barriers, artificially high prices may be maintained. The excess production thereby induced burdens the national economy because the Secretary of Agriculture is required by law to support the price of milk at levels between 75 and 90 percent of parity by purchase and withdrawal from the market of the product of that surplus production. 7 U.S.C. § 1446 (C).

The purpose of the Act is to raise and stabilize producer prices by encouraging interstate commerce in agricultural products. 7 U.S.C. § 601, and see *Hood & Sons v. Dumond*, 336 U.S. 525, 545. The challenged provisions of Order No. 27 and similar provisions in other federal orders[9] impede inter-area commerce and discriminate against major producing areas of the United States.

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[9] See, e.g., recent hearings on proposed federal order for Washington, D.C. Marketing Area wherein the Secretary, in recommending the establishment of a regulated market, stated at 23 Fed. Reg. 3721: "Because of the distances that eastern fluid markets are from areas of alternative supply in the Midwest, the price for milk for fluid uses in eastern markets is higher in relation to manufacturing milk values than is the case in the Midwest. Under such circumstances there might be an incentive for dealers in unregulated adjacent markets to seek a Class outlet in the Washington market for temporary or seasonal surpluses in excess of their local market needs. Because of the substantial number of Government installations in the area which procure their milk supplies on a competitive bid basis for relatively short periods there is a considerable opportunity, unless appropriate safeguards are provided, for such unregulated dealers to market milk excess to their local needs at prices below the value of milk for fluid uses. They may do this by bidding off available contracts at such Government installations. This situation would be a serious disruptive factor to orderly marketing in the Washington marketing area. *It is essential, therefore, that the order be constructed in a manner which will safeguard the market from serving as a surplus disposal area for surrounding markets.*" (Emphasis added.)

### 3. The decision of the Court below is erroneous.

The purpose of § 8c of the Act is to maintain reasonable prices for milk producers by promoting orderly marketing conditions. 7 U.S.C. § 602, *U. S. v. Rock Royal Coop.*, et al., 307 U.S. 533. The constitutional power of a state to regulate the pricing of milk was established in *Nebbia v. New York*, 291 U.S. 502. That case recognized that unequal acquisition costs among handlers in a market results in "price cutting and other forms of destructive competition," 291 U.S. at p. 518, leading finally to a deterioration in producer prices.[10] Where the price paid to milk producers is fixed by law it is necessary, to avoid discrimination among competing handlers, that the price for each class of milk be uniform among all handlers in the same market. 7 U.S.C. § 608c(5)(C).

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[10] • • • "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations), can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned *so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.*" (Emphasis added.) 291 U.S. at p. 517.

Classified pricing under state regulation failed when this Court held in *Baldwin v. Seelig*, 294 U.S. 511, that New York was powerless to exclude from its markets "milk paid for in Vermont below the New York minimum." 294 U.S. at p. 524. Because of that limitation on state power, Congress adopted the Agricultural Marketing Agreement Act of 1937 as amended. *U. S. v. Rock Royal Coop.*, et al., supra. So long as milk entering a regulated market has been priced equally to competing handlers, nothing in § 8c of the Act, expressly or impliedly, authorizes the Secretary of Agriculture to exclude it. *Kass v. Brannan*, supra.[11]

The decision below is grounded on the wholly erroneous premise that the regional marketing scheme (J. A. 12a) authorizes, nay requires, preferred treatment for regional producers.[12]

In *Kass*, the Court clearly recognized that the Secretary was authorized by § 8c of the Act to limit the entry of milk

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[11] Not even dissenting opinion by Judge Learned Hand disputes that proposition: "What orders, short of prohibition or limitation, the Secretary might adopt to protect the new system of 'pool plants' which he had set up, it was certainly for him to say within the limits of his statutory powers. One method might have been to restore to the producers in a 'pool' what they had lost by the 'non-pool' competition of each handler; *but that was patently impossible to determine, and nobody suggests that it should have been attempted.* Another method was to impose upon a 'non-pool' handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool'. The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground. * * *" 196 F. 2d p. 798.

[12] "The establishment of the Act on a regional marketing basis necessitates differentials between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept." (J. A. 12a)

into a regulated market only to the extent that its entry would destroy the price structure in the market. *Daily Farm Dairy Co. v. Anderson*, 157 F. 2d 87 (8th Cir., 1946), does not hold to the contrary. That case involved an individual handler pool rather than a marketwide pool.[13] Hence there was no equalization or Producer Settlement Fund to be concerned with. The facts were that handlers in St. Louis were purchasing "outside" milk for fluid use at a price lower than the St. Louis order price. The Court held that the provision in the St. Louis order limiting the entry of lower priced outside milk was authorized by the Act.

Both the language of § 8c and its legislative history supports the holding of the *Kass* case and opposes the decision of the Court below. Sec. 8c(5) of the Act expressly limits the provisions of a market order to the terms and conditions in §§ 8c(5) and 8c(7) and "no others." Sec. 8c(5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

Paragraph (g) of § 8c(5) is known as the Andresen amendment and was placed in the bill prior to enactment into law at the insistence of Representative August Andresen of Min-

[13] In an individual handler pool, each handler in the market pays *his producers* a blend price determined by the handler's own use in each class rather than the marketwide use. See § 8c(5)(B)(i).

nesota who was fearful lest the Secretary be given the power to establish trade barriers in milk and dairy products.[14]

The purpose and intent of § 8c(5)(G) was explained by Justice Jackson in *Hood & Sons v. Dumond*, 336 U.S. 535. In that case the State of New York had denied Hood a permit to buy additional milk supplies from New York producers for shipment into the Boston area. The grounds for denial were to protect and advance local economic interests. New York's regulatory scheme was similar in plan and purpose to the federal Act. It contended that "• • • such restraint or obstruction as its order imposes on interstate commerce does not violate the Commerce Clause because the state regulation coincides with, supplements and is part of the federal regulatory scheme. • • •" 336 U.S. 525, 540. In rejecting this argument Justice Jackson said at pages 543-545:

> "When it is considered that the federal Act was passed expressly to overcome 'disruption of the orderly exchange of commodities in interstate commerce' and conditions found to 'burden and obstruct the normal channels of interstate commerce,' 7 U.S.C., § 601, it seems clear that we can not sustain the State's argument that its restrictions here involved supplement and further the federal scheme.

[14] 79 Cong. Rec. 9462, 9572 and 13022. At p. 9462: "Mr. Andresen: 'Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?'

"Mr. Jones: 'No. There is nothing in that bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply with in that region.' • • • but he cannot set up any trade barriers which would keep them out. • • •"

"Moreover, we can hardly assume that the challenged provisions of this order advance the federal scheme of regulation because Congress forbids inclusion of such a policy in a federal milk order. Section 8c(5)(G) of the act provides:

> "'No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.'

"While there may be differences of opinion as to whether this authorizes the federal order to limit, so long as it does not prohibit, interstate shipment of milk, see Baily Farm Dairy Co. v. Anderson, 157 F. 2d 87, 96; Baily Farm Dairy Co. v. Jones, 61 F. Supp. 209, 221—a question upon which we express no opinion—it is clear that the policy of the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation.

"The only federal restriction of handlers' purchases from new producers, found in § 8c(5)(B) [sic],* authorizes inclusion, in orders concerning milk or milk products, of a clause providing that for deliveries made during the first sixty days a new producer shall be paid only the minimum price applicable for milk of the particular use classification, subject to adjustments not relevant here. This provision was included in the 1935 amendment, 'to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market * * *.' S. Rep. No. 1011, 74th Cong., 1st Sess., p. 11. And it was added, 'This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effec-

*8c(5)(D)

tive only for the specified * * * period.' Ibid. The bill originally provided for a ninety-day minimum price period but in conference the less restrictive sixty-day period was adopted. H.R. Rep. No. 1757, 74th Cong., 1st Sess., p. 21.

"These sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C. § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction."[15]

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[15] 79 Cong. Rec. 13022 (1935). Debates on Conf. Rep. H. R. No. 1757, 74th Cong. 1st Sess., at p. 13022. Mr. Jones: "The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do not have the protection of this bill they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. Under the provisions of this bill if a price was fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price."

## CONCLUSION

The sole statutory basis for the challenged provisions is asserted by the government and the Court below to rest in § 8c(7)(D) of the Act. The exclusionary provisions, it is claimed, are necessary for the administration of the Act. This Court has recently held that administrative necessity cannot authorize an exercise of power withheld by Congress. *Denver Stockyard Co. v. Producers Live Stock Marketing Association*, 356 U.S. 282, 298. There, the Court struck down regulations sanctioned by the Secretary of Agriculture under the Packer and Stockyard Act, 7 U.S.C. § 181 et seq. The regulations complained of gave the Denver Stockyard Company a monopoly in the marketing of all livestock produced "within the normal marketing area" of the Denver yard. This Court found that the plain words of the Act prohibited the discriminatory regulations that would have permitted stockyard owners to compel marketing agencies to enter into exclusive dealing arrangements, stating "[i]f the Act does not fit the present economics of the business, a problem is presented for the Congress."

The challenged provisions of Order No. 27 are designed, avowedly, to exclude from the market "outside producers." Sec. 8b exempts from the coverage of the antitrust laws *authorized* marketing agreements entered into under the Act, but the narrow price fixing and market exclusion devices permitted by §§ 8c(5)(A) and 8c(5)(D) should not be permitted, by an arrogation of power, to be extended to accomplish a purpose uniformly condemned as contrary to public policy. *Maryland-Virginia Milk Producers Association, Inc. v. U. S.*, 362 U.S. 458; *U. S. v. Borden Co.*, 308 U.S. 188.

For the foregoing reasons the State of Minnesota urges at the Petition for a Writ of Certiorari be granted.

Respectfully submitted

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# APPENDIX A

## Statute Involved

§ 608c . . . . .

(5) MILK AND ITS PRODUCTS; TERMS AND CONDITIONS OF ORDERS.

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers*, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the

approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at

the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contracts between the association and its producers; *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order."

# APPENDIX B

## Opinion of the Court

(Filed February 20, 1961)

By McLAUGHLIN, *Circuit Judge*.

The prime issue presented by these appeals is whether certain provisions of New York–New Jersey Milk Marketing Order, 7 C.F.R. § 927.1 et seq., (hereinafter referred to as Order No. 27), requiring all non-pool handlers of milk, to make a "compensatory payment" to the Producers Settlement Fund for all non-pool fluid milk distributed by them in the marketing area, 7 C.F.R. §§ 927.83, 927.84, contravenes the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 et seq.

Docket No. 13,289, is an enforcement action brought by the United States pursuant to § 8a (6) of the Act, 7 U.S.C. § 608a (6), to require Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., to make the compensatory payments required by the order. Dockets Nos. 13,290 and 13,291, are actions by the Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc., respectively, to obtain judicial review of decisions of the Judicial Officer in the United States Department of Agriculture pursuant to § 8c (15) of the Act, 7 U.S.C. § 608c (15) (B). The Judicial Officer held that the contested provisions for compensatory payment were valid.

In the district court, all three actions were consolidated for trial.[1] In its opinion reported in 183 F. Supp. 80 (1960), that court, although finding the provisions for compensa-

[1] In Docket No. 13,289, pending final outcome of the cases, the district court ordered that the compensatory payments be paid into the registry of the court, and enjoined Lehigh from further violating Order No. 27.

tory payments supported by the record and "incidental to * * * and necessary to effectuate the other provisions of such order," invalidated them under the authority of the majority holding in Kass v. Brannan (Judge Learned Hand dissenting), 196 F. 2d 791 (2 Cir. 1952).[2] The court noted however:

> "Although we are not compelled to accept that Court's decision under the concept of *stare decisis* as it applies to Federal Courts and although we might have reached a contrary result if initially called upon to interpret § 608c (5), we do not feel justified in now rejecting the interpretation there placed upon § 608c (5) (A) and upon the earlier version of Order No. 27. That Court's opinion is always entitled to great weight."

The primary policy of Congress in enacting the Federal Milk Control program and particularly Order No. 27, applicable in the case at bar,[3] was "* * * to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices * * *." 7 U.S.C. § 602 (1) (1952). Regarding milk, the plight of the farmers (referred to as producers in the milk industry) was caused by the fierce competition to procure the most lucrative market for it. Since fluid milk brought the highest return to the producer and cream or milk product utilization was less rewarding, the rivalry was for that market. To alleviate the

[2] Specifically the district court stated:

"* * * in light of the *Kass v. Brannan* decision, *supra*, the Order as promulgated did not comply with Section 608c (5) (A) of the Agricultural Marketing Agreement Act, 7 U.S.C.A., in that the prices were not uniform as to *all* handlers and in particular as to these two plaintiff handlers. Therefore, that part of the Order requiring compensatory payments to the Producers Settlement Fund by them must be stricken down."

[3] For a more detailed discussion of the Order and the problems of the milk industry, see Nebbia v. New York, 291 U.S. 502 (1934); United States v. Rock Royal Co-op., 307 U.S. 533 (1933).

harsh effects of that struggle on producers, Congress enacted the governing law vesting the Secretary of Agriculture with broad regulatory powers. Pursuant to the statutory authorization, the Secretary of Agriculture has promulgated regional milk orders based on a system of milk pooling. Those orders, with their programs of classification and reporting, are geared to provide the producer in the specified marketing area with a uniform price for all milk delivered by him for processing, irrespective of the particular use to which it is ultimately put.

This is accomplished by the following method. Under Order No. 27 milk utilization is classified into three fundamental groups: Class I (fluid milk); Class II (cream); Class III (milk products, butter, cheese, etc. * * *). The Market Administrator fixes a price for each class. He then determines from reports filed by the handlers the volume of milk used in each classification throughout the marketing area. From those figures, the Administrator computes the value of all milk used in the Marketing Area by multiplying the market volume figure in each class by the class price. After adding the totals and making certain additions and or subtractions not relevant here, he divides that figure by the aggregate volume of milk of all classifications used in the Marketing Area, to determine the uniform blend price which is paid to all producers, regardless of the utilization of their milk. Since each handler's use of the milk received from producers would not average out to the uniform blend price, a Producers Settlement Fund was created. This fund is contributed to by those handlers whose total class utilization price of the milk exceeds the uniform blend price and is drawn upon by those handlers whose total class utilization price of the milk is less than the uniform blend price. Thus, although the producer receives the uniform blend price regardless of the utilization of his milk, the handler must account to all other handlers through the Producers Settlement Fund for the price of his actual use of the milk purchased by him.

Lehigh and Suncrest are not fully regulated handlers, the largest part of their milk business being outside the marketing area. However, since a certain percentage of their outlets for milk (approximately 5%) are in the marketing area, they are subject to the compensatory payment provisions of Order No. 27, 7 C.F.R. §§ 927.83, 927.84, which provide that where a non-pool handler distributes milk for Class I utilization in the marketing area, he must pay into the Producers Settlement Fund a compensatory payment measured by the difference between the Class I and Class III price.

Lehigh and Suncrest attacked this provision and were sustained by the district court on the authority of Kass v. Brannan, supra. That case held that mandatory compensatory payments imposed upon non-pool handlers for fluid milk distributed in the marketing area were, "* * * inconsistent with the terms and conditions specified in section 8c (5) (A) * * *." That section reads as follows:

> "Milk and its products; terms and conditions of orders.
>
> (5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

To reach its conclusion, the court in Kass compared the cost of the milk to pool handlers with that of non-pool handlers. It stated that although the cost to a pool handler is the class price, a non-pool handler's cost is composed of two items, the amount it pays the seller and the amount of the compensatory payment. The court decided that since the payment is based on the difference between two class prices without taking into account the initial cost to the handler, the result is a disparity between the non-pool handler's total cost and the pool handler's total cost which violates the uniformity provision of Section 8c (5) (A) of the Act. We cannot agree with the holding.[4]

The Kass opinion assumes that the minimum class price provision of Section 8c (5) (A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:

> "The result sought to be achieved by Congress in this section [8c (5) (A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage." (Emphasis supplied.)

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

Section 8c (5) (A) of the Act makes no reference to equalizing neither fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme

[4] We note that a recent case in the District Court of Connecticut, Knudsen Brothers Dairy, Inc. v. Benson, Civil No. 8145 (D.C. Conn. July 19, 1960), followed the mandate of its circuit as set forth in the Kass opinion. As it adds nothing to the conclusion in Kass it will not be discussed.

Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U.S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F. Supp. 66, 73 (N.D. Ohio 1960).

Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the Kass case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

It is evident that in all three illustrations, employment of the Kass theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Con-

gress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.[5]

We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: "Such price shall be uniform as to all handlers," guarantees them a cost equal to that of pool handlers.[6] But there is not the slightest indica-

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[5] Examination of the Kass opinion on its own facts reveals that Kass was a *handler* who purchased cream and condensed milk from another handler. Pursuant to Section 927.9(h) of Order No. 27, Kass was charged compensatory payments on the cream measured by the difference between the Class II-A and Class IV-A price and on the condensed milk measured by the difference between the Class II-B and Class IV A price. Clearly Section 8c (5) (A) has no application in such a situation. It only contemplates minimum class prices which *handlers* shall account to the pool for on milk purchased from *producers*. It makes no reference to situations where *handlers* purchase milk from other *handlers*. Even if it could be said that it was designed to limit the imposition of compensatory payments at all, and we hold that it was not, it would be applicable solely to handler-producer transactions, and not to handler-handler transactions. Lawson Milk Company v. Benson, 187 F. Supp. 66, 70-71 (N.D. Ohio 1960); see also, dissenting opinion of Judge Learned Hand in Kass v. Brannan, 196 F. 2d at 799.

[6] As a matter of statutory construction if we were to adopt the theory of Lehigh and Suncrest and thereby include non-pool producers within the ambit of the term "producers" in Section 8c (5) (A), the provisions of the next section, 8c (5) (B), which requires payment of the uniform blend price to "producers," would also be applicable to Lehigh and Suncrest. In effect, the Market Administrator would have the choice of either imposing full regulation on Lehigh and Suncrest or no regulation at all. So limiting the discretion of the Market Administrator is inconsistent with the tenor of the entire act and contrary to the accepted judicial interpretation of its terms. See, e.g., Queensboro Farms Products v. Wickard, 137 F. 2d 969, 977 (2 Cir. 1943); Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87, 94-95 (8 Cir. 1946).

tion that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan. "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole."[7] This was acknowledged early in the history of the Act by the Supreme Court when it held that agency cooperatives were subject to the Act even though they did not technically purchase the milk of their producers. United States v. Rock Royal Co-op., 307 U.S. 533 (1938). See also Bailey Farm Dairy Co. v. Anderson, 157 F. 2d 87, 95 (8 Cir. 1946).

The Act does not attempt nation-wide regulation, but rather "* * * authorizes a marketing agreement and order to be issued for such production or marketing regions or areas as are practicable." United States v. Rock Royal Co-op, supra at 576. "The Act recognizes that the factors which affect the problem vary in different production and marketing areas and that the question therefore is one that must be dealt with regionally on the basis of the particular conditions." Baily Farm Dairy Co. v. Anderson, supra at 90. This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulations. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must account to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full

[7] Frankfurter, J., in Stark v. Wickard, 321 U.S. 288, 311, 315 (1944) (dissenting opinion).

regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.[8]

The aim of Section 8c (5) (A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c (5) (B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act, stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

The final contentions of Lehigh and Sunerest are that the provisions for compensatory payments are not allowed by the Act and not supported by the record. As we have stated previously, the district court found the provisions "incidental to * * * and necessary to effectuate the other provisions of such order" under Section 8c (7) (D) of the Act and also found the provisions supported by the record. We agree with the district court's conclusion. 183 F. Supp. at pp. 89, 90. See also Lawson Milk Company v. Benson, supra, at pp. 72, 73.

The judgment of the district court will be reversed and the proceedings remanded to that court with instructions

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[8] Although admittedly Lehigh Valley Cooperative Farmers, Inc., is subject to another milk order, as we view Section 8c (5) (A) that has no bearing on its position concerning sales in the Order No. 27 area.

(1) to affirm the ruling and decision of the Judicial Officer in Lehigh Valley Cooperative Farmers, Inc. v. Benson, No. 13,290, and Suncrest Farms, Inc. v. Benson, No. 13,291; and (2) to issue an injunction as prayed for in the complaint in United States v. Lehigh Valley Cooperative Farmers, Inc., et al., No. 13,289 to require the appellees to comply with the terms of §§ 927.29(d) and 927.83 of the New York-New Jersey Milk Marketing Order for the payment of compensatory payments and to pay to the Market Administrator the money in the registry of the district court in this proceeding.

A true Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

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# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 892

LEHIGH VALLEY COOPERATIVE FARMERS, INC., AND SUNCREST FARMS, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENTS

These consolidated cases present important questions as to the validity of certain provisions of the New York-New Jersey Milk Marketing Order (7 C.F.R., Part 927), effective pursuant to the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, *et seq.*). These provisions require certain "handlers" of milk to make payments—generally referred to as "compensatory payments"—to the producer-settlement fund established by the order with regard to milk which is disposed of as fluid milk in the marketing area. The Court of Appeals for the Third Circuit held that the

provisions were authorized by the Act (Pet. 32–41; 287 F. 2d 726).

The Court of Appeals for the Second Circuit had previously held in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that provisions substantially the same as those involved here were invalid. That court accepted the contention upon which petitioners here primarily rely—that the relevant sections of the order fail to comply with the standards set forth by Section 8c(5) of the Act, 7 U.S.C. 608c(5) (App. 27). However, the same issue is now pending in the Second Circuit again. *Knudsen Brothers Dairy, Inc.* v. *Freeman* (C.A. 2, No. 26,698, argued May 4, 1961).

It is our position that the decision of the Third Circuit in the instant cases is correct. There is at the present time, however, an undeniable conflict between the views of the Second and Third Circuits. Accordingly, we do not now oppose the present petition for a writ of certiorari and we would not oppose it in the event that the Second Circuit should, in the *Knudsen Brothers* case, adhere to the position which it took earlier in the *Kass* case. However, should the Second Circuit repudiate *Kass* in the *Knudsen Brothers* case and agree with the Third Circuit that the contested portions of the order are valid, there would be no further need for review by this Court. We respectfully suggest, therefore, that the Court withhold action on the petition until the beginning of the October Term, 1961, so as to await, for a reasonable time, the Second Circuit's decision in the *Knudsen Brothers* case.

1. (a) The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, interstate or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish as the prices to farmers, parity prices * * *" and as will avoid unreasonable fluctuations in supplies and prices. 7 U.S.C. 602. But whenever the parity prices are unreasonable with respect to milk in a particular marketing area, in view of the relevant economic factors in that area, the Act directs the fixing of such prices for the marketing area as will reflect the economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. 7 U.S.C. 608c(18).[1]

To achieve those purposes, the Act authorizes the Secretary of Agriculture to issue regional marketing orders, each order being specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c (5), (11). The basic function of the orders is to assure the payment of uniform minimum prices to farmers by "handlers," a term defined as meaning "processors, associations of producers, and others engaged in the handling of * * *" the commodity or product.

[1] This Court has, in the past, noted the unique problems of the milk industry, arising from the intrinsic nature of its product. *Nebbia* v. *New York*, 291 U.S. 502, 516–518; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 549–550.

Section 8c(5) of the Act, 7 U.S.C. 608c(5) (App. 27), provides that a milk order shall contain one or more of the terms and conditions described therein "and (except as provided in subsection (7)) no others." Subsection (7)(D) (App. 29) authorizes the inclusion of such auxiliary provisions as are "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order."

Order No. 27 was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in the New York metropolitan marketing area. 3 F.R. 1945, 1957, 2100, 2102. In 1957 the order was amended to extend the marketing area to Northern New Jersey and certain additional areas in New York. 22 F.R. 4643. The plan set out by the order is generally characterized as a market-wide pool and requires the classification, pooling, and pricing of all milk delivered by producers or associations of producers to "pool plants". The pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.[2]

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk received at the pool plants is classified into three basic categories according to its utilization: Class I (fluid milk), Class II (cream), and Class III (milk prod-

[2] The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 927.25–927.29.

ucts, butter, cheese, etc.).[3] 7 C.F.R. 927.37. Pursuant to the order, the receiving handlers make monthly reports to the Market Administrator as to the quantity of milk purchased by them which falls into each of the use classes. 7 C.F.R. 927.50. The Administrator determines "minimum prices" for the various use classifications and, from these prices, he calculates a "uniform" or "blend" price which is applicable to all the milk received from the producers.[4] This uniform

[3] In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, in which this Court upheld the constitutionality of the Agricultural Marketing Agreement Act of 1937, the Court also had occasion to consider the scheme of Order No. 27 and to reject several attacks upon its validity. The Court explained thus the reasoning underlying the formulation of the scheme:

"* * * Since all milk produced cannot find a ready market as fluid milk in flush periods, the surplus must move into cream, butter, cheese, milk powder and other more or less non-perishable products. * * * The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. * * * [C]utthroat competition [among producers] would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act." 307 U.S. 533, 550.

[4] The formula underlying the blend price has been described as follows:

"The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions

price is the minimum price which each pool plant handler must pay to all his producers. 7 C.F.R. 927.70.

The Market Administrator maintains a fund known as the "Producer Settlement Fund". 7 C.F.R. 927.75. Each handler whose uses place his milk in a high return category must pay into the Producer Settlement Fund the amount by which the use "value" of the milk exceeds the uniform price required to be paid the producers. Each handler whose use "value" of the milk purchased is less than the uniform blend price required to be paid to the producers is entitled to withdraw the amount of the difference from the Producer Settlement Fund. Thus, while every producer receives a uniform minimum price for the milk he sells regardless of the use made of it by the particular handlers who purchased it, the handlers are required to pay varying amounts geared to the uses which they actually make of the milk.

The above-mentioned scheme of the order is, as we have noted, applicable only with respect to milk which has been delivered by "producers" [5] to "pool plants". It is not applicable with respect to milk

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or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk." *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

[5] The word "producer", as used in the order, is a word of art. It refers solely to a farmer whose milk is delivered to a pool plant, and whose milk is therefore subject to the classification, pooling, and pricing provisions of the order. 7 C.F.R. 927.6. A farmer who delivers his milk to a nonpool plant is referred to as a "dairy farmer". 7 C.F.R. 927.5.

which is delivered by "dairy farmers" to "nonpool plants".[6] Accordingly, handlers who operate nonpool plants are not required to pool their milk under the order or to pay minimum prices to the dairy farmers from whom they purchase their milk. However, the order does require nonpool handlers to make "compensatory payments" to the Producer Settlement Fund for any milk which they dispose of as Class I–A milk (*i.e.*, fluid milk) in the marketing area. The amount of the compensatory payment is measured by the difference between the Class I–A price and the Class III price.[7] 7 C.F.R. 927.83, 927.84 (Pet. 26–31). It is the validity of these compensatory payment provisions of the Order which is at issue in this litigation.

(b) Petitioner Lehigh Valley Cooperative Farmers, Inc. and petitioner Suncrest Farms, Inc. operate milk processing plants located, respectively, at Allentown and Bethlehem, Pennsylvania. Both plants distribute milk, in fluid form, in the New York-New Jersey marketing area and are, accordingly, eligible to participate in the marketwide pool as pool plants.[8]

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[6] The "nonpool plants" are those which operate primarily outside the marketing area—*i.e.*, while they may dispose of some milk in the marketing area, they generally handle milk destined for other areas or other uses.

[7] The regulatory justification for the promulgation of the compensatory payment requirement is discussed, *infra*, pp. 12–17.

[8] That is true as to petitioner Suncrest for all of the period involved, from August 1, 1957, to the present. As to petitioner Lehigh, it appears to have been true only since September 1, 1958, when the order was amended to provide for an election. Prior to that time, Lehigh had modified its operations in such a way that it would not qualify as a pool plant (R. 322a–326a; § 927.29(d), R. 831a–832a).

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However, because they sell less than 25% of their production in the market area, they are not required to participate and may elect to be treated as nonpool plants. 7 C.F.R. 927.29(d). Both petitioners have so elected and are thus, for purposes of the order, nonpool plants (R. 87a, 118a; Pet. 35). Accordingly, they are subject to the compensatory payment provisions of the order with respect to the fluid milk which they ship into the New York-New Jersey area.

On August 1, 1957, petitioners filed petitions with the Secretary of Agriculture, pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(15)(A), alleging that Sections 927.83 and 927.84 of the order (Pet. 26–31), insofar as they required petitioners to make compensatory payments, were not authorized by the Act (R. 9a–23a, 26a–39a). A Hearing Examiner concluded in his recommended decision in both cases, on the authority of *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that the compensatory payment provisions were invalid (R. 42a–57a, 58a–59a). However, the Judicial Officer, acting on behalf of the Secretary, dismissed the petitions, sustaining the validity of the relevant provisions (R. 86a–116a, 117a–141a; Pet. 32).

During the pendency of the administrative proceedings, the United States brought suit against the two petitioners in the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8a(6) of the Act, 7 U.S.C. 608a(6), to compel them to comply with the order pending final adminis-

trative and judicial disposition of the Section 8c(15) proceedings (R. 165a). The district court entered a temporary injunction directing petitioners to pay the compensatory payments required by the order into the registry of the court until termination of the other proceedings, and retained jurisdiction over the cause (R. 189a–193a).

Following the adverse decisions of the Secretary, each of the petitioners filed in the district court a suit for review of the Secretary's ruling, in accordance with Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), and the two review actions were consolidated with the pending enforcement action. In the district court, as before, petitioners' basic contention, supported by the authority of *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, was that the compensatory payment provisions were invalid in that they violated the "uniformity" requirement in Section 8c(5)(A) of the Act, 7 U.S.C 608c(5)(A) (App. 27). That section provides:

> (5) *Milk and its products; terms and conditions of orders.*
>
> In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk

> purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

In the *Kass* case, the Second Circuit, Judge Learned Hand dissenting, held that, in requiring nonpool handlers to make compensatory payments into the Producer Settlement Fund for fluid milk distributed in the marketing area, Order No. 27 violates the requirement of the above provision of the Act that prices "be uniform as to all handlers." The court viewed the requirement that "minimum prices" be uniform as, in effect, contemplating that the actual *cost* of milk to all handlers distributing milk in the marketing area be the same. It reasoned that, by virtue of the compensatory payment provisions, nonpool handlers would, in most cases, be subjected to a higher cost for their milk than were pool handlers. This followed, said the court, because, while the cost to a pool handler is the class price of the milk, a nonpool handler's cost consists of both the amount it pays the seller and the amount of the compensatory payment. As the amount of the compensatory payment is based on the difference between two class prices, and does not take into account the initial cost to the handler, the court observed that the nonpool handler's total cost is likely to exceed that of the pool handler, a result in violation of Section 8c(5)(A).

The district court in the instant cases held the compensatory payment provisions to be invalid under the authority of the *Kass* case (R. 210a–231a, Pet. 33).[9] On the government's appeal, the Court of Appeals for the Third Circuit reversed, upholding the validity of the challenged provisions (Pet. 32–41). The court declared that the *Kass* decision had erred in construing Section 8c(5)(A) as requiring that all handlers, pool and nonpool, be guaranteed an equal cost for their milk and that, indeed, such a reading "misconceives the plain language of the section" and, in its effects, "directly conflict[s] with the comprehensive regulatory undertaking of the complete Act as conceived by Congress" (Pet. 36, 38). Reasoning that Section 8c(5)(A) necessarily has reference only to pool plants, *i.e.*, fully regulated handlers who must pay uniform prices to their producers and account to the Producer Settlement Fund for their utilization of the milk, the court concluded that the section (Pet. 40):

> * * * provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the pro-

[9] The district court's judgment decreed that petitioners could withdraw the money which they had paid into the registry of the court, but stayed the execution of this judgment for 21 days (R. 233a). On the government's motion, a further stay, pending appeal, was granted by the court of appeals. The petition indicates that, as of its date, petitioner Lehigh Valley Cooperative Farms, Inc. had paid $577,749.48 and petitioner Suncrest Farms, Inc. had paid $99,862.73 into the registry of the district court (Pet. 6).

> ducer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and nonpool handlers. * * * [I]ts only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

Finally, the court ruled that the compensatory payment provisions were authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App. 29), in that they were "incidental to * * * and necessary to effectuate the other provisions" of the order, and ruled further that the formulation of the provisions was supported by the administrative record (Pet. 41).

2. Petitioners assert that the decision of the Third Circuit in the instant cases is, in basic respects, in conflict with the decision reached by the Second Circuit in the *Kass* case (Pet. 6, 7, 9, 12, 13, 14, 17). We agree.[10] We submit, however, that the court below properly upheld the validity of the compensatory payment provisions of the order, and that the contrary *Kass* decision is based upon a misconception of the purpose of the Act and the regulatory scheme.

(a) In designing the regulatory framework of Order No. 27, the Secretary of Agriculture deemed it essential to formulate a plan of partial regulation with regard to handlers who do only a small part of their

[10] The compensatory payment requirements of the order were, in substance, the same during the time period relevant in the *Kass* case.

business in the marketing area.[11] Without such regulation, nonpool handlers would have a substantial competitive advantage over the fully regulated pool handlers in the sale of fluid milk in the marketing area and the entire regulatory program would be put in serious jeopardy (R. 752a–755a, 216a).

The nonpool handler, unlike the pool handler, is not required by the order to pay minimum prices to his dairy farmers, a factor placing nonpool milk at a competitive advantage over pool milk in the marketing area and thereby aiding nonpool sales to displace pool sales. In addition, the nonpool operator who has a higher ratio of Class I sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he could afford to pay his farmers a price based on his own utilization of the milk. The pool handler obviously could not afford to pay a high utilization price to his producers for milk, and at the same time meet his obligation to make payments into the Producer Settlement Fund for the benefit of all producers. As nonpool fluid milk sales in the marketing area displace sales that otherwise would have been made by pool handlers, pool handlers would be compelled to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The effectiveness of the regulatory scheme would be greatly impaired and its purposes frustrated.

[11] For detailed explanations as to the severe adverse effects which leaving nonpool handlers completely unregulated would have on the regulatory scheme, see, *e.g.*, 18 F.R. 8444–8448; 22 F.R. 4179, 4207–4208; R. 752a–755a.

Petitioners do not appear to deny the need for some form of partial regulation of nonpool handlers.[12] In devising the particular form of that regulation, in turn, the Secretary necessarily has wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 614; *Stark* v. *Wickard*, 321 U.S. 288, 310; *Mitchell* v. *Budd*, 350 U.S. 473, 480; *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 977 (C.A. 2). The record shows plainly that the Secretary gave careful consideration to the various proposals at the rule-making hearings, and selected the present provisions as the most fair and feasible alternative (18 F.R. 8449–8450; 22 F.R. 4207–4208; R. 752a–755a). Given the apparent admission that partial regulation of some

[12] The alternative—full regulation of the handlers who make only a small portion of their sales in the marketing area—has been held permissible. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. However, such full regulation of nonpool handlers is likely to burden them unduly and place them at a severe competitive disadvantage with regard to other nonpool handlers in the sale of milk in unregulated areas. 22 F.R. 4207–4208. See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72 (N.D. Ohio).

The petitioners here, as we have noted (p. 8, *supra*), have elected to be subjected to partial regulation, in the form of the compensatory payments, rather than to full regulation. Accordingly, should the Court grant certiorari here, the government would urge as one of its contentions that petitioners are, to the extent that they have claimed the benefits of partial regulation, estopped from contending that its incidents are invalid.

sort is needed, no valid objection can be made to the provisions actually adopted.

Petitioners contend that the formula for computing compensatory payments is unjustified and that it should be based on the actual cost of their milk to nonpool handlers (Pet. 16–20). That alternative, however, was expressly considered by the Secretary and was found, for reasons stated at length in his findings, not to be a suitable or adequate measure. 18 F.R. 8449. A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York-New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order)—*i.e.*, a blend price based on the particular handler's own utilization. Such a handler could account to his own farmers at the full Class I price for any fluid milk sold in the marketing area and thereby avoid making compensatory payments. By availing himself of the New York-New Jersey market to increase his percentage of fluid milk sales above the average of the marketwide pool, he could thus increase the payments to his farmers (based on his own uses) above the uniform blend price paid producers supplying pool plants (based on marketwide pool utilization).

The same would be true, though to lesser extent, of a handler who is unregulated and needs to pay his farmers simply the going market price, which would

normally be, in the New York-New Jersey milkshed, the New York blend price. Since such a handler, under petitioners' formula, would have to make a compensatory payment for the excess of the Class I price over his actual cost, the net utilization value of fluid milk sold in the marketing area would be only the New York blend price (the amount paid his farmers) rather than the full Class I value. By using the New York-New Jersey market to dispose of his otherwise surplus milk, however, he could still increase the utilization value of that milk from the Class III price to the blend price. Combined with his Class I sales outside the marketing area, that would give him an overall utilization value greater than the marketwide pool average and thus enable him to pay more to his farmers than the New York blend price. In turn, moreover, any increase in the price paid his farmers would be partially absorbed (*i.e.*, as to the fluid milk sold in the marketing area) by a corresponding reduction in the required compensatory payment.

The only compensatory payment that can avoid those effects under the conditions prevailing in the New York-New Jersey marketing area [13] is one measured

[13] Under other conditions, of course, different provisions might suffice to prevent nonpool handlers from having an undue competitive advantage. For example, where, in less complex milksheds, pool and nonpool handlers are geographically separated and are not in competition for farmers, the ability of nonpool handlers to pay their farmers more than can pool handlers may be less significant. Because of differences of that kind, a particular provision—*e.g.*, permitting nonpool handlers to account to their farmers on an individual pool basis and account to the marketwide pool only for any difference—may be appropriate for some areas but not for others. See *e.g.*, the order for upstate Michigan, 7 C.F.R. Part 916; § 916.84.

by the full difference between the Class III and Class I prices. That difference, it may be noted, is exactly the additional amount for which a fully-regulated pool handler must account to the Producer Settlement Fund whenever he shifts milk from a Class III use to a Class I use. It is largely that aspect of the order—the handler's liability to the fund is always greater by the Class III-Class I differential when he sells milk for Class I uses than when he sells it for Class III uses—that stabilizes the market and prevents destructive competition for the Class I market. Unless the non-pool handler is faced with the same cost *differential* in choosing between Class III sales and Class I sales in the marketing area, the incentive is present for him to undercut the market, if necessary, in order to convert his otherwise Class III sales into Class I sales. The important thing is to assure, not that the actual costs are the same, but that the cost differential dependent upon the class of sale is the same.

Since the compensatory payment provisions in question are thus essential to the effective operation of the entire regulatory scheme, the provisions are, as the court below found (Pet. 41), authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App. 29) as "[i]ncidental to * * * and necessary to effectuate the other provisions" of the order. See also *Lawson Milk Co.* v. *Benson,* 187 F. Supp. 66, 72–73 (N.D. Ohio).

Contrary to petitioners' contentions (Pet. 10–12), this Court's decisions in *Brannan* v. *Stark,* 342 U.S. 451, and *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, do not call for a different conclusion. In

*Brannan* v. *Stark, supra,* the Court held that the Act did not authorize provisions permitting deductions from the Producer Settlement Fund for payments to producers' cooperatives. The Court found that such deductions were not justified by the record,[14] and pointed out further that Congress had expressly dealt with the problem of deductions in Section 8c(5). In contrast, the compensatory payments in issue here are, as we have shown, justified by the record. Moreover, the payments represent a form of partial regulation not within the purview of the basic authorizing provisions of Section 8c(5), yet obviously both "incidental" and "necessary" to the effectiveness of the basic scheme within the contemplation of Section 8c (7)(D). The decision in *United States* v. *Rock Royal Co-op.,* 307 U.S. at 575–576, in which this Court stated that, "[w]hile considerable flexibility is provided by § 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified," similarly gives no support to petitioners in the case at bar.

(b) The provisions for compensatory payments are in no way inconsistent with or violative of Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A) (App. 27). Petitioners' argument to the contrary is predicated on the section's requirement that an order fixing "minimum prices", for each use classification, "for milk purchased from producers or associations of producers" make such prices "uniform as to all handlers." In reliance on *Kass* v. *Brannan,* 196 F.

[14] See, in this connection, *Grant* v. *Benson,* 229 F. 2d 765 (C.A. D.C.), certiorari denied, 350 U.S. 1015.

2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, petitioners urge that this requirement has application to both pool and nonpool handlers, and by guaranteeing the uniformity of minimum class prices, prohibits "a provision requiring nonpool handlers to pay more for milk of the same use than pool handlers" (Pet. 7).

Petitioners' interpretation of Section 8c(5)(A) must fail for several reasons. In the first place, as stressed by the court below (Pet. 36–37), petitioners and the Second Circuit in the *Kass* case have erred in reading the uniformity requirements of the minimum class-price provision of Section 8c(5)(A) as designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. The Act makes no reference to or provision for equality of costs among handlers. Its "immediate object * * * is to fix minimum prices for the sale of milk by producers to handlers." *Stark* v. *Wickard,* 321 U.S. 288, 291. As this Court has pointed out, the minimum price provisions of the Act, promulgated for the benefit of producers, do not forbid handlers to pay prices above the minimum price (*ibid.*). Since pool handlers' initial costs may thus be disparate, and yet are in no way relevant in determining their accountability to the Producer Settlement Fund, it becomes plain that the scheme does not even seek to equalize the actual costs of fully regulated handlers. There is thus no warrant for reading Section 8(c)(5)(A) as assuring uniformity of handler outlays.

It must also be stressed that the *Kass* decision's interpretation of Section 8c(5)(A) as requiring that

compensatory payments be measured with reference to the handlers' actual costs necessarily defeats the purposes of the statutory scheme. As we have previously pointed out, *supra*, pp. 15–17, and as the court below emphasized (Pet. 37–38), it would be wholly ineffective to base nonpool handlers' obligations on their actual costs. See also Judge Learned Hand, dissenting, in *Kass* v. *Brannan*, 196 F. 2d 791, 799. The remaining alternatives would be either to exempt nonpool handlers from any regulation, with a resulting severe adverse impact on the entire scheme, or to regulate them fully to their serious prejudice. Such an interpretation of the statute, rendering it unworkable, should be rejected. Cf. *Sunshine Coal Co.* v. *Adkins*, 310 U.S. 381, 392.

In any event, the court below was correct in concluding that the provisions of Section 8c(5)(A) simply have no application to nonpool handlers or their obligations (Pet. 38, 40). The requirement in Section 8c(5)(A) is that the minimum prices "for milk purchased from producers or associations of producers" be uniform. In Order No. 27, the Secretary has defined the word "producer" as referring to "any dairy farmer whose milk is delivered direct from farm to a pool plant." 7 C.F.R. 927.6. Since, pursuant to this definition, nonpool handlers do not purchase their milk from "producers", the uniformity provision of Section 8c(5)(A) is by its terms inapplicable to them. Furthermore, as it is only with respect to the milk of "producers" that minimum prices must be paid under the order, non-

pool handlers have no obligation to pay minimum prices. Accordingly, Section 8c(5)(A), in requiring that minimum prices be uniform, can have no applicability to nonpool handlers.[18]

Petitioners, however, relying again on the *Kass* case, urge that the Secretary has no power so to limit the definition of "producer" and that the term properly includes dairy farmers who sell to nonpool plants as well as those who sell to pool plants (Pet. 13–15). As the court of appeals pointed out (Pet. 38–39, fn. 6), however, that argument proves too much, for if petitioners must be treated as "handlers" purchasing milk from "producers" for purposes of Section 8c (5)(A), they must by the same token be so treated for purposes of the marketwide pooling provisions authorized by Sections 8c(5)(B)(ii) and (C). In short, if petitioners are right, the system of partial regulation they have been allowed to elect (applicable only to milk disposed of in the marketing area) in preference to full regulation (requiring pooling of all

[18] The Secretary's position that Section 8c(5)(A) does not apply to nonpool handlers was also recently accepted by the United States District Court for the Northern District of Ohio, which, like the court below, rejected the *Kass* decision in holding compensatory payment provisions authorized by the Act. *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio). That decision is now pending on appeal to the Court of Appeals for the Sixth Circuit. On April 11, 1961, the Sixth Circuit entered an order staying the proceedings in the appeal "pending the outcome of the case of *United States* v. *Lehigh Valley Cooperative Farmers, Inc., et al.*, Nos. 13289, 13290 and 13291 (C.A. 3) which we are advised will be taken to the Supreme Court on petition for certiorari."

milk handled by them) is unauthorized and they must be subjected to full regulation.[16]

The limitation of the pooling provisions to handlers and producers closely associated with the market—accomplished by the definitions of "pool plants" and "producers"—is in fact, however, fully authorized. It is true, as petitioners claim (Pet. 14), that Section 8c (5) itself does not in terms distinguish between various classes of handlers and producers. But Section 8c (11)(A) expressly directs that marketing orders be limited in application to *regional* production or marketing areas. The authorization of regional orders requires, in turn, that a line be drawn between those producers and handlers subject to the pooling provisions of a particular order and those who are not, and it is that function that is served by the Secretary's definitions of "producers" and "pool plants" under Order No. 27. In substance, they define the "area" in which the pooling provisions of that order are applicable, though doing so in terms of functional rather than geographical relationships to the market. That is plainly a permissible method of defining the scope of a "regional" order, and we do not understand petitioners to challenge the provisions permitting handlers who do only a small part of their business in the mar-

[16] Section 8c(5)(A) itself, moreover, requires the prescribed minimum prices to be paid for *all* milk delivered by producers to the handler, and it is that requirement that must be "uniform." Hence, even if paragraph (A) alone were applicable, it would mean that petitioners are subject to the minimum pricing provisions on all their milk, and not just that sold in the marketing area.

keting area to elect not to be subject to the pooling provisions of the order.

Once it is conceded, however, that the Secretary may exempt petitioners from the pooling requirements of the order, it necessarily follows that Section 8c(5)(A) is inapplicable to them. Paragraphs (A), (B), and (C) are interrelated parts of the statutory scheme, and together provide the authority for the establishment of milk pools: (A) provides for the payment by handlers of the prescribed minimum prices for their actual utilization of milk (*i.e.*, the "use" price): (B) provides for the payment to producers of a uniform price regardless of use (*i.e.*, the "blend" price); and (C) authorizes the establishment of the equalization fund needed to effect the accountings required by (A) and (B) (*i.e.*, the Producer Settlement Fund). Since the very purpose of those paragraphs is the authorization of pooling provisions, they are by definition inapplicable to any handlers properly excepted from the pooling requirements. The scope of the "uniformity" requirement of subsection (A) on which petitioners rely is necessarily the same; it simply requires that the pooling provisions themselves be of equal application—*i.e.*, that the minimum prices to handlers for *pooled* milk be uniform. Since petitioners are, by their own election, not subject to the pooling provisions, that provision can have no application to them.

In the end, Section 8c(5)(A) is neither the source of the authority for, nor in any way concerned with the terms of, the incidental regulation of handlers who are not subject to the pooling requirements of the order. The source of that regulation is instead Sec-

tion 8c(7)(D), which authorizes provisions "[i]ncidental to, and not inconsistent with, [the provisions specified in subsection 5] * * * and necessary to effectuate" their purpose. The compensatory payment provisions, being applicable only to handlers who are not subject to the pooling provisions specified in Section 8c(5), cannot be "inconsistent" with those provisions and, being necessary to prevent the purposes of the pooling provisions from being undermined by the unregulated competition of nonpool handlers, are "necessary to effectuate" the pooling provisions. Hence, as the court below concluded, they are fully authorized by Section 8c(7)(D).[17]

[17] Petitioners argue further that the effect of the compensatory payment provisions is to exclude nonpool handlers from the marketing area, in violation of Section 8c(5)(G) of the Act, 7 U.S.C. 608c(5)(G) (App. 28) (Pet. 20). That argument was not asserted in the administrative proceedings, and is therefore not presented here. *United States* v. *Ruzicka*, 329 U.S. 287, 292–294; *La Verne Co-op. Citrus Ass'n* v. *United States*, 143 F. 2d 415, 418 (C.A. 9); *Panno* v. *United States*, 203 F. 2d 504, 508–509 (C.A. 9). It is, in any event, without merit. As Judge Learned Hand remarked, rejecting precisely this contention in his dissenting opinion in the *Kass* case (the majority of the court did not reach this issue), "The plaintiff's argument * * * must be, that § 8c(5)(G) forbids any provision in an order, however necessary to protect a 'pool,' if in operation it will result in limiting the introduction of 'products' into 'the marketing area.' I cannot believe that, when Congress decided to regulate the industry in order to assure a 'uniform price' to producers, it meant by § 8c(5)(G) to forbid all protective measures, which should result in lessening the amount of 'products' which without such measures would have entered the 'marketing area' in question." 196 F. 2d 791, 800. See also *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87, 96–97 (C.A. 8), certiorari denied, 329 U.S. 788. Moreover, the compensatory payment

**CONCLUSION**

Because of the existing conflict between the decision below and that of the Second Circuit in *Kass* v. *Brannan*, *supra*, we do not, at this time, oppose the granting of the petition for certiorari. However, as we have already noted, essentially the same issue is again pending before the Second Circuit in *Knudsen Brothers Dairy, Inc.* v. *Freeman*, No. 26,698, in which oral argument was heard on May 4, 1961.[18] Should the Second Circuit in that case overrule its prior decision,

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provisions in question are applicable to nonpool handlers generally, wherever located, and thus have no reference to milk produced in a particular geographical "production area", as contemplated by Section 8c(5)(G).

Finally, petitioners assert that if the compensatory payment provisions are authorized by Section 8c(7)(D) of the Act, that section illegally delegates legislative power in violation of Article I, Section I, of the Constitution (Pet. 20–21). That contention was not raised by petitioners at any stage of the proceedings below, and thus is not properly presented here. However, this argument too is patently unsound. In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 575–576, this Court specifically ruled that, while Section 8c(7)(D) provides considerable flexibility, it does not delegate legislative power unconstitutionally because "it gives opportunity only to include provisions auxiliary to those definitely specified."

[18] The *Knudsen Brothers* case is an action for review of the Secretary's decision holding the compensatory payment provisions of the Springfield, Massachusetts, marketing order (7 C.F.R. 996.65(b)) valid as applied to the plaintiff handler. The district court rejected the handler's contentions that the compensatory payment provisions were, by their terms, inapplicable to transactions between the handler and a military base. However, on the basis of the *Kass* case, it ruled that the provisions were invalid because violative of the "uniformity" requirement of Section 8c(5)(A) of the Act. *Knudsen Brothers Dairy, Inc.* v. *Benson*, D. Conn., Civil No. 8145, July 19, 1960. The same questions have been presented on the Secretary's appeal to the Second Circuit.

as the government has urged, the issue will have been correctly resolved by both circuits and there will remain no need for review by this Court. We suggest, therefore, that the Court defer action on the present petition, until the beginning of the October 1961 Term, pending the decision of the Second Circuit in *Knudsen Brothers Dairy, Inc.* v. *Freeman.*

Respectfully submitted.

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JUNE 1961.

## APPENDIX

The Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 601, *et seq.*, provides, in pertinent part:

§ 608c. Orders regulating handling of commodity.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during

a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product

thereof produced in any production area in the United States.

* * * * *

(7) *Terms common to all orders.*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(11) *Regional application.*

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title.

* * * * *

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

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IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

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## No. 79

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,

*Petitioners*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

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## BRIEF FOR PETITIONERS

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## BRIEF FOR PETITIONERS

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### Opinions Below

The Opinion of the United States District Court for the Eastern District of Pennsylvania is reported in 183 F. Supp. 80 (1960). The Opinion of the United States Court of Appeals for the Third Circuit is reported in 287 F. 2d 726 (1961).

### Jurisdiction

The judgments of the United States Court of Appeals for the Third Circuit were entered February 20, 1961. The

jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

## Statutes and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. 601 et seq. The provisions essential to this case are as follows:

> Milk and its products; terms and conditions of orders
>
> 8c(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:
>
> (A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices *shall be uniform as to all handlers,* subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)
>
> (B) Providing:
>
> (i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the

production for market of milk covered in such order or by producers who, during such representative period, have produced at least three fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following

the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

• • • • • •

Terms common to all orders

8c(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) of this

section orders shall contain one or more of the following terms and conditions:

• • • • • •

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order.

The administrative Order involved herein is Order No. 27, as amended, regulating the handling of milk in the New York-New Jersey Milk Marketing Area, 7 C.F.R. Part 927. The Order is set out in full in the Appendix, R. 815a et seq., and the provisions involved in this case are:

| | | |
|---|---|---|
| Section 927.5 | Dairy Farmer | R. 820a |
| Section 927.6 | Producer | R. 820a |
| Section 927.7 | Handler | R. 820a |
| Section 927.9 | Pool Plant | R. 821a |
| Section 927.83 | Payments on milk received from dairy farmers at non-pool plants | R. 879a |
| Section 927.84 | Payments on milk or milk products the source of which is not established | R. 882a |

## Questions Presented

1. Does Section 8c(5), and particularly subsection 8c(5)(A) of the Agricultural Marketing Agreement Act of 1937, as amended, which requires that "such prices shall be uniform as to all handlers," permit the Secretary to impose on handlers operating non-pool plants, compensatory payments which, when added to the actual prices paid by such handlers to dairy farmers or producers for the milk, result in a substantially higher price than is required to be paid by handlers operating pool plants under Order No. 27?

2. Does subsection 8c(7)(D), which authorizes provisions "incidental to," "not inconsistent with" and "necessary" and which this Court has said gives opportunity only to include

provisions auxiliary to and not in conflict with those definitely stated, permit the imposition of such compensatory payments?

3. Does subsection 8c(5)(G), which provides that a Federal Order applicable to milk and its products shall not prohibit the flow of milk from any production area into a marketing area, permit provisions imposing such compensatory payments when the effect of such provisions is, in fact, to prohibit the entry into the marketing area of outside milk?

4. If subsection 8c(7)(D) does permit the imposition of such compensatory payments without regard to the standard of price uniformity specified in subsection 8c(5)(A), is it an illegal delegation of legislative authority in that no standards are set with which the Secretary must comply?

5. Do the words "producers" and "handlers" used in subsection 8c(5)(A) mean only "pool handlers" and "producers shipping to pool plants", even though those terms were not used by the Secretary until long after the enactment of the statute, and despite the fact that the Secretary in Order No. 27 defines "handlers" to include both non-pool and pool handlers?

6. If the meanings of the words "producers" and "handlers" are thus limited, does the statute then authorize the Secretary to regulate non-pool handlers and dairy farmers in any respect?

7. Can it be said that handlers who have served a segment of the present marketing area over a long period of years before the expansion of the marketing area, caused a loss of sales to producers who ship to pool handlers?

## Statement of the Case

A hearing was held pursuant to the authority of the Marketing Agreement Act of 1937, as amended, for the purpose of determining first, if thirteen (13) counties in Northern

New Jersey should have federal milk regulation; secondly, should regulation be achieved by a separate order; and finally, what should be the provisions thereof. The hearing call and the rulings of the Secretary of Agriculture limited the questions to the promulgation of a separate order for this area, or no order at all. Extension of the existing marketing area of the New York Order, No. 27 to include Northern New Jersey could not have resulted from the hearing, inasmuch as that proposal was not in the call.

After eighty-two (82) hearing days and approximately 12,000 pages of testimony, the hearing call was expanded on five (5) days' notice to permit consideration of the additional question of including Northern New Jersey in the marketing area of Metropolitan New York. The expanded hearing call was insisted upon throughout the hearing by two of the dominant cooperatives operating in New York. The new call stated that the record previously developed could be used by the Secretary in a determination of this question, even though this proposal was not an issue during the development of the previous record. The Petitioners through counsel objected to proceeding on the additional call on such short notice, and to the use of the previous record in resolving the new question. The Hearing Examiner overruled Petitioners' objections. The hearing then continued for another twenty-four (24) days.

The Secretary issued an order effective August 1, 1957, which contained provisions, among others, expanding the marketing area of Metropolitan New York to include the thirteen (13) counties of Northern New Jersey. The Order by definition included the Petitioners as handlers. (R. 820a.) It also provided certain conditions which were required for a plant to be designated a pool plant. (R. 821a.) Anyone operating a pool plant is known as a pool handler. Other plants were designated non-pool plants, and those operating such plants are known as non-pool handlers. Producers of milk shipping to pool plants were defined by the Order as "producers". (R. 820a.) Those shipping to non-pool plants were designated as "dairy farmers". (R. 820a.)

The Order also classified milk subject to Order No. 27 into three basic classes: Class I (I-A and I-B—fluid milk) carrying the highest price; Class II (cream), carrying the next highest price; and Class III (milk products such as butter, cheese, etc.) carrying the lowest of the three prices. The Petitioners sell only packaged fluid milk in the marketing area, except an insignificant amount of fluid cream. Their sales in the marketing area are limited to Phillipsburg, New Jersey and environs. Class III milk is commonly referred to in the industry as surplus milk.

The Order then included Sections 927.83 and 927.84 (R. 879a and 882a) referred to by the Secretary in his decision in support of the Order as "compensatory payments" (R. 743a). These sections are substantially the same as the sections that previously appeared in Order No. 27, which were invalidated by the Court of Appeals for the Second Circuit in the case of *Kass v. Brannan,* 196 F. 2d 791, C. A. 2 (1952). cert. denied 344 U. S. 891. These provisions, here contested, required non-pool handlers, the category in which Petitioners fall, to contribute to the Producer Settlement Fund the difference between the Class I price and the Class III price for all milk sold in the marketing area as Class I. Under the terms of the Order, these payments are then added to the payments due the producers shipping to pool plants who did not produce such milk and whose handlers did not market the milk in the area. This requirement disregarded the uncontroverted facts that the Petitioners had served the Phillipsburg market for 15 and 27 years, and were paying producers for the milk sold there and elsewhere substantially more than the Order No. 27 Class III price. The Secretary in his decision supporting the Order found this to be true. (R. 708a.) In fact, the Petitioners paid more than Order No. 27 Class I prices for the milk sold in and out of the area. The payments demanded of Petitioners, when added to the prices they paid for milk, amount to substantially more than was or is being paid by their competitors whose prices are fixed by Order No. 27.

These sections impress penalties upon the Petitioners of sufficient severity to drive them from a market of which they are an historical part. Their effect is to preempt to handlers and producers customers in the market which they had never served.

The market built and served by the Petitioners was not developed by the sale of cheap milk. The Pennsylvania Milk Control Commission, created originally in 1933, for the time here involved fixed prices to be paid producers by handlers for milk packaged in the area where Petitioners are located, and sold either outside the Commonwealth of Pennsylvania or within the Commonwealth of Pennsylvania. These prices for Class I milk are higher than the Order No. 27 prices for milk of the same usage.

The financial burden upon Petitioners excludes them from this market and gives the Order No. 27 handlers a closed market, even though Petitioners have never enjoyed and do not seek to enjoy any special price advantage or any other advantage whatsoever.

Lehigh Valley Cooperative Farmers, Inc., and Sunerest Farms, Inc., on August 1, 1957, the first day they could do so, filed petitions with the Secretary of Agriculture for an administrative review of Sections 927.83 and 927.84, the compensatory payment provisions of Order No. 27 effective August 1, 1957. The Petitions were filed pursuant to the administrative remedy provided by Section 8c(15)(A) of the Agricultural Marketing Agreement Act. Simultaneously the Department was requested to grant an Interim Stay, which was denied. Subsequent to filing the Petitions, the United States on September 7, 1957, moved against the Petitioners by an enforcement proceeding in the United States District Court for the Eastern District of Pennsylvania. The District Court, by an injunctive order, required the Petitioners to comply with the Order pending the ultimate disposition of the (15)(A) and the (15)(B) proceedings. The Order, however, directed that the monies demanded of the Petitioners by the Administrator of Order No. 27

be paid into the Registry of the Court. To comply with the provisions of Order No. 27 and the Court's injunctive order, the Petitioners were required to file monthly reports with the Administrator of the Order. By these reports Petitioners were forced to elect pool or non-pool status, even though the validity of Sec. 927.83 was then under attack.

The petition for administrative review as provided by the statute was heard before an independent Hearing Examiner. After full hearing and consideration of the facts and law involved, he filed his Recommended Report invalidating the compensatory payment provisions. Exceptions to the Report were filed by the Secretary of Agriculture, and following argument before the Secretary's Judicial Officer, the questioned provisions were ruled valid and lawful.

Petitioners appealed to the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8c(15)(B) of the Act. The cause was argued before Judge Clary of that Court. Subsequently he handed down an Opinion and Order declaring that Sections 927.83 and 927.84 violated the uniformity clause of Section 8c(5)(A) of the Act, and were, therefore, invalid. As found by the Hearing Examiner in his Recommended Report, which Finding was not overruled by the Judicial Officer, the District Court determined that milk for fluid usage could not be purchased in this area at the Class III price, and that the price required to be paid by these petitioning handlers for milk sold in the marketing area and elsewhere was higher than that of their competitors, who were Order No. 27 pool handlers. This fact has not been controverted by the Government at any stage.

The (15)(B) and enforcement proceedings were consolidated by the United States District Court. The Secretary of Agriculture and the United States appealed the decision of the District Court to the United States Court of Appeals for the Third Circuit. The decision of that court by Judge McLaughlin issued on February 20, 1961, reversed the District Court. Petitioners filed an application for rehearing,

which was denied on March 10, 1961. The Court of Appeals in no way disturbed the Findings of Fact of the Hearing Examiner or the District Court.

Petitioners petitioned this Court for a Writ of Certiorari which was granted June 19, 1961.

## Summary

On August 1, 1957, the Secretary of Agriculture of the United States, acting under the authority of the Agricultural Marketing Agreement Act of 1937, as amended, 7. U. S. C. 601 et seq., extended the New York Metropolitan Milk Marketing Area described in Order No. 27, 7 C. F. R. Part 927, to Northern New Jersey. The extension brought Phillipsburg, New Jersey and its environs, as well as other portions of Northern New Jersey, under the jurisdiction of Order No. 27 for the first time.

Included in the terms of Order No. 27 to which Petitioners became subject by the amendment of August 1, 1957, are provisions for the establishment of uniform class prices all handlers in the market are to pay for milk they purchase from producers, based upon the form in which it is sold.

It is also provided that all producers shall receive a uniform price which results from a division of the total use value of the milk sold in the area by the volume of milk sold. A Producer Settlement Fund, or Equalization Fund has been established by the Market Administrator to make possible the calculation and payment to producers of the uniform price. Handlers who participate in the pooling arrangement are known as pool plants or pool handlers. Pool farmers, defined in the Order as "producers," are limited to those who ship milk to pool plants or handlers.

By thus specifying certain handlers and producers who shall make up the pool, there remain handlers and farmers who also sell milk in the marketing area but are not a part of the pool. These are described in the Order as non-pool plants, or handlers, and the farmers who ship to them are

dairy farmers. Petitioners are non-pool handlers, and their shippers are dairy farmers.

The Secretary, by another provision in the Order, Section 927.83, has imposed upon non-pool handlers an obligation to contribute to the pool for distribution among the producer-members of the pool a payment, which he terms a "compensatory payment," measured by the difference between the Class I and Class III prices established in Order No. 27 on all milk sold by Petitioners in the marketing area. It is to this payment that Petitioners object.

Petitioners filed an appeal under the Review sections of the Act, 8c(15)(A) and (B), immediately after August 1, 1957, the effective date of the amendment to Order No. 27. Enforcement proceedings were brought by the Secretary, and Petitioners were directed by the Court to pay the contested charges into the registry of the Court from month to month until the litigation is terminated. For milk sold in the area to July 31, 1961 Lehigh's payment into the registry was $617,454.22, and that of Suncrest $108,767.79.

The Record of the hearings upon which the amendment of August 1, 1957 was based, the Findings of Fact in the Secretary's Decision in support of that amendment, the Records of the Review Proceedings in these cases, the Findings of the Hearing Examiner in the administrative proceedings, and the Findings of Fact of the District Court are in agreement that Petitioners must pay the uniform Order No. 27 blend price or something in excess thereof, in order to procure the milk they sell in the marketing area. This price is substantially in excess of the Order No. 27 Class III price. The result is that the prices Petitioners must pay plus the compensatory payment exacted from them of 5¢ to 6¢ a quart are substantially higher than those required to be paid by pool handlers under Order No. 27. The Record of the review proceedings also discloses that Petitioners paid more for their *Class I* milk than the Order 27 class price. The increased prices imposed upon Petitioners in the form of the contested compensatory payments will render their

competitive position in the area untenable, and abandonment of their sales to Order No. 27 pool plants inevitable. The Secretary erroneously assumed he had a choice to make: to accord uniform treatment to all handlers and farmers *for milk they sell in the marketing area*, or to exclude all handlers and farmers from participation in the market except those who make up the pool. He chose the latter. The Secretary's actions are in direct violation of the specific provisions of the Act, and contrary to the intention of Congress clearly set forth in the legislative history of the Act.

In the depression years in the early 1930's the Congress of the United States authorized the Secretary of Agriculture to regulate the handling of various agricultural commodities, among them milk. The delegation of power was made in specific terms and in accordance with clearly stated standards. Both the delegation and the standards are completely contained in Sections 8c(5) and 8c(7)(D) of the Act. The power conferred was to fix minimum class prices which all handlers were required to pay for milk sold in a marketing area, which the Secretary was authorized to establish. It was provided that those prices were to be uniform as to all handlers. In addition, the power was conferred upon the Secretary to establish a marketwide pool, as was done in Order 27, by virtue of which all producers of milk sold in the marketing area were to receive uniform prices. Thus it was stated without equivocation that there should be no discrimination between handlers or producers serving a given marketing area. Further, the Secretary was authorized to include in his regulatory orders auxiliary terms incidental to, not inconsistent with and necessary to carry out the specific authority granted. Finally, to guarantee against the very results which have been produced, Congress, after full consideration and discussion, provided that no milk order should prohibit the marketing "in that area of any milk or product thereof produced in any production area in the United States", and no restrictions were allowed to be placed thereon except those imposed upon all other milk in the area.

Section 927.83 of Order No. 27, here in issue, violates the uniform price requirements in Section 8c(5)(A) of the Act. The price obligations imposed by the Secretary upon a non-pool handler differ violently from those imposed upon a pool handler. Both the methods of pricing and the resultant prices are dissimilar, and serve to eliminate the non-pool handler from the market. The same question arose in the case of *Kass v. Brannan*, 196 F. 2d 791, C. A. 2 (1952), cert. den. 344 U. S. 891. The compensatory payment provisions of Order No. 27, which were substantially the same then as now, were held to be contrary to Section 8c(5)(A) of the Act and were, therefore, declared invalid. Both the majority and the dissenting judge in that case recognized that to be valid at all compensatory payments would need to bring about price uniformity among handlers.

The Act permits no distinction between pool and non-pool handlers, and directs the Secretary to accord uniform treatment to *all* handlers. This the Secretary has failed to do, and his discrimination renders Section 927.83 of Order No. 27 invalid.

The challenged provisions are not authorized by Section 8c(7)(D) of the Act, since they are inconsistent with and in conflict with the uniform price provisions of both sections 8c(5)(A) and (B). Similar arguments have been made in other cases where the Secretary has sought to exercise powers not conferred by Congress in 8c(5) of the Act. This Court has confined the Secretary's activities under 8c(7)(D) to those which are purely "auxiliary", and not contrary to those set forth specifically in Section (5)(A) (*U. S. v. Rock Royal Cooperative*, 307 U. S. 533; *Brannan v. Stark*, 342 U. S. 451), as did the Court of Appeals in *Kass v. Brannan*, *supra*. Section 8c(7)(D) confers no new powers upon the Secretary, nor does it extend or enlarge any of the specific powers granted him in 8c(5)(A).

Section 927.83 of Order No. 27 is in conflict with Section 8c(5)(G) of the Act which provides that no order shall pro-

hibit the marketing in the area of any milk produced in any production area in the United States. The charge imposed by the contested provision upon milk supplied non-pool handlers by farmers is of such magnitude that its entry into the marketing area is prohibited. No handler could possibly sell milk in the area which is priced to him at 5¢ to 6¢ per quart higher than to his pool plant competitors. In reality, then, the contested provision prohibits the flow of milk into the market from other production areas, and fosters monopoly. The pool plants in the market are effectively given exclusive rights to all the sales in it.

This Court dealt with a factual situation where an attempt was made to "obstruct the normal channels of interstate commerce" insofar as movements of milk were concerned. The Court held that it was ". . . the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk". *Hood & Sons v. DuMond*, 336 U. S. 525. Other attempts to use the machinery of farm legislation to foster monopolies and interfere with the free flow of commerce have come before the Supreme Court. This Court again dealt with one such an attempt in the case of *Denver Union Stockyards Company v. Producers Live Stock Marketing Association*, 356 U. S. 282, a case which arose under the provisions of the Packers and Stockyards Act of 1921. The Court there denied the right of a stockyard owner to make market agencies registering with it exclusive agents and thereby achieve a monopoly over the handling of cattle in its particular area.

The effect of Section 927.83 of Order No. 27 is to drive handlers with long established in-area sales and distribution out of the marketing area, and prevent new handlers from entering it, all for the benefit of a carefully defined group of handlers and producers. Even though Congress foresaw such a possibility and framed the Act to avoid it, the New York-New Jersey Milk Marketing Area is closed to all handlers and producers except those designated as pool plants and producers who ship their milk to pool plants.

The contested payments represent forced contributions to a pool, which are distributed among the farmers who supply pool plants, and who have no part whatsoever in producing the milk furnished by the farmers to non-pool plants for sale in the area. They are not *compensatory* payments by any definition, but are in fact penalties and were so described by the Court of Appeals in the case of *Kass v. Brannan, supra.*

It has been argued that the price uniformity requirements of Section 8c(5)(A) apply only to prices paid by pool handlers, and that Section 8c(5) of the Act has no relationship to non-pool handlers. If that premise is granted, in view of the plain statutory declaration that the Secretary may include no terms in an order other than those set forth in Section 8c(5), it follows that there is no authority in the statute to regulate non-pool handlers at all. The Petitioners make no such contention. They do assert, however, that as handlers selling milk in the New York-New Jersey Milk Marketing Area, they are entitled to be treated uniformly with all other handlers selling milk in the market, and to be free from discrimination.

Section 927.83 renders achievement of price uniformity between pool and non-pool handlers an impossibility. It is, therefore, invalid.

## ARGUMENT

### I. Material Facts

Lehigh Valley Cooperative Farmers, Inc., was organized in 1935, and qualified as a Capper-Volstead Cooperative. It is a farmers' cooperative composed of about 3,400 members, of whom approximately 900 ship milk to the Lehigh Valley plant located in Allentown, Pennsylvania. Its sales area encompasses the territory located within a radius of 35 miles of Allentown, Pennsylvania. This area covers the urban centers and environs of Allentown, Bethlehem and Easton, Pennsylvania, and Phillipsburg, New Jersey. (R. 693a.) This entire area has been recognized by the United States Census Bureau as one metropolitan or commercial area. The Cooperative has distributed fluid milk from its routes in this area for approximately 27 years. Its volume of fluid milk packaged and sold in the Phillipsburg, New Jersey area is approximately 8,000 quarts per day. (R. 304a.)

In the fiscal year 1956, the Cooperative handled slightly more than 184,000,000 pounds of milk, and somewhat more than this in subsequent years (R. 303a). The Petitioner has never called upon its producer members to retain milk on the farm, nor to divert milk to other outlets. When milk in excess of the Class I requirements is offered, it is accepted and manufactured into other products by the Cooperative. Thus, it handles all the surplus associated with its Class I sales (R. 307a-308a, 311a, 312a, 673a, and 892).

In the case of Petitioner's sales of bottled milk in the New Jersey area, the minimum prices fixed by the New Jersey Office of Milk Industry are and have been charged, and for sales made in Pennsylvania Petitioner has charged the prices established by the Pennsylvania Milk Control Commission. During the short periods of time when no minimum resale prices were fixed by the New Jersey Office of Milk Industry, Lehigh Valley charged the "going prices" which were the minimum prices fixed by the Pennsylvania

Milk Control Commission for sales in Allentown, Bethlehem and Easton, Pennsylvania.

Lehigh Valley is a handler under the provisions of Order No. 61, the Federal Order regulating the handling of milk in the Philadelphia Milk Marketing Area, and is subject to the applicable provisions of the New Jersey Office of Milk Industry and the Pennsylvania Milk Control Commission.

Lehigh Valley sells about five times as much Class I milk in the marketing area of Order No. 61 as in the marketing area of Order No. 27 (R. 305a). For this reason, it could not qualify as a pool plant under Order No. 27 from August 1, 1957 to September 1, 1958. There are no facts which have been established in this record to determine whether the Cooperative could have qualified as a pool plant under Order No. 27 from September, 1958 to the present time.

By virtue of the contested provisions of Order No. 27, Sections 927.83 and 927.84, commonly spoken of as "compensatory payments", and referred to by the Court in the case of *Kass v. Brannan, supra*, as "penalty payments", the Cooperative is required to pay into the Order No. 27 Producer Settlement Fund for distribution among producers shipping to pool plants between $15,000 and $20,000 per month, a total to July 31, 1961 of $617,454.22, an obligation imposed only upon Petitioners, and those similarly situated. This increased obligation amounts to between 5 and 6¢ per quart, for milk sold in Northern New Jersey, and would prohibit the flow of the Cooperative's milk into Phillipsburg, New Jersey, a market which it has served for some thirty years.

Suncrest Farms, Inc., is a licensed milk dealer in the Commonwealth of Pennsylvania, and a handler as defined by Federal Order No. 27. Petitioner buys, processes, bottles, manufactures and sells milk and milk products in the same area as Lehigh Valley (R. 249a). All its sales into New Jersey are in packaged form, classified as I-A under Order No. 27, and Class I under the Pennsylvania Milk Control Commission Orders. The processing and packaging function is performed in its plant in Pennsylvania, and delivery is made into the New Jersey area from this plant.

Suncrest operates under the jurisdiction of the Pennsylvania Milk Control Commission and is required to pay the minimum prices established in the applicable Orders of the Pennsylvania Milk Control Commission for the milk it sells, both in Pennsylvania and New Jersey. The Pennsylvania Milk Control Commission has authority to and does establish prices Petitioner must pay for all its Class I milk, including that sold in New Jersey. *Commonwealth v. Eisenberg Farm Products*, 306 U.S. 346, 352-353, and *Hood & Sons v. DuMond*, 336 U.S. 525, 530.

Historically and throughout the period August 1, 1957 to date, the minimum producer price established by the Pennsylvania Milk Control Commission and paid by Petitioner for Class I milk of either 3.5% butterfat or 4% has been at least equal to, and for the most part higher than, the comparable Class I-A price under Federal Order No. 27. As an example, during the month of September, 1957, the Pennsylvania Milk Control Commission established a price of $6.40 per cwt. for milk of 4% butterfat content sold as Class I milk in Pennsylvania and as Class 1-A milk in Phillipsburg, New Jersey. The Class 1-A price under Order No. 27 for the same month, for the same type of milk, delivered to a plant located in Easton, Pennsylvania, was $6.23. The compensatory payment for this month was $2.78 per cwt. which brought the price required to be paid by Petitioner to $9.18 per cwt. This is $2.95 per cwt. more than Order No. 27 dealers would be required to pay, who also sell milk in Phillipsburg, New Jersey. For the month of August, the price for milk delivered to Easton established by the Pennsylvania Milk Control Commission was $6.00 per cwt., and the price established by Order No. 27 was $5.94 per cwt. The Pennsylvania Milk Control Commission monthly and annual average Class I prices have been on an ascending curve since then, while the Federal Order 27 Class 1-A prices have been on a descending curve.

The testimony discloses that for the month of August, Petitioner returned to its producers $5.57 as a blend price for

all of the milk it purchased, and for September $6.21. These figures are in excess of the blend prices returned by pool handlers under Order No. 27 (R. 247a-248a).

It should be noted that Federal Order No. 27 plants can and do sell milk in Pennsylvania for which they pay Order No. 27 prices, which gives them a distinct advantage over Petitioner and others so situated.

Petitioner does not lay off its producers, nor divert its surplus milk to any Federal Order No. 27 plants. (R. 892). The compensatory payments required of Petitioner are approximately $2,000 to $2,500 per month, a total to July 31, 1961 of $108,767. It is apparent that Petitioner cannot make the compensatory payments demanded and continue to do business in Phillipsburg, New Jersey, a market which it has served for more than 15 years.

## II. The Statutory Plan

### A. The Statute

The Congress of the United States declared in the Agricultural Adjustment Act of 1933,[1] as amended and as re-enacted and amended by the Agricultural Marketing Agreement Act of 1937,[2] that the disruption of orderly marketing in interstate commerce impairs the purchasing power of farmers, and destroys the value of agricultural assets. It was, therefore, declared to be the policy of Congress that the Secretary of Agriculture should have power to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers for such products, parity prices.[3] If the prices thus determined for a marketing area are not reasonable in view of the various economic factors affecting the market supply and demand for milk and its products, the Act directs the fixing

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[1] Act of May 12, 1933 (48 Stat. 31), as amended August 24, 1935 (49 Stat. 750).

[2] Act of June 3, 1937 (50 Stat. 246) 7 U.S.C. 601 et seq.

[3] 7 U.S.C. 602(1).

of such prices as will reflect those economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest.[4] Congress delegated authority to the Secretary to hold hearings, and gather information and evidence upon which administrative orders might be issued.[5] The delegation of authority, due to the Constitutional limitations set forth by the Supreme Court in the case of *Schechter v. U.S.*,[6] and other cases, was made within well defined channels and accompanied by a clear statement of standards to be followed by the Secretary in exercising the delegated authority.[7]

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[4] 7 U.S.C. 608c(18). *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 59 S. Ct. 933, 83 L. Ed. 1446 (1939).

[5] 7 U.S.C. 608c(3) and (4).

[6] *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 55 S. Ct. 835, 79 L. Ed. 1570 (1935).

[7] *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, at 575:

> ". . . Unlike the language of the National Industrial Recovery Act condemned in the A.L.A. Schechter Poultry Corp. Case (295 U.S. page 538, 79 L. ed. 1584, 55 S. Ct. 837, 97 A.L.R. 947), the tests here to determine the purpose and the powers dependent upon that conclusion are defined. In the Recovery Act the Declaration of Policy was couched in most general terms. In this Act it is to restore parity prices, § 2. Under the Recovery Act, general welfare might be sought through codes of any industry, formulated to express standards of fair competition for the businesses covered. *Here the terms of orders are limited to the specific provisions, minutely set out in § 8c(5) and (7).* While considerable flexibility is provided by §8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified." (Emphasis added).

The *Senate Report No. 1011* on the Act includes the following significant language:

> "To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, *and specify the terms which may be included in*

In the case of milk and its products, the statutory delegation and standards appear in Sections 8c(1) through (5) of the Act.[8] To guarantee that the delegation of power to the Secretary would be within proper constitutional limits, Congress provided in Section 8c(5) that orders pertaining to milk and its products were required to contain one or more of the terms and conditions described in Section 8c(5) and *no others*, except as provided in subsection 8c(7)(D) of the Act, where the Secretary was authorized to include terms incidental to, not inconsistent with, and necessary to effectuate the provisions of an Order specifically authorized in Section 8c(5).[9]

8c(5)(A), (B) and (C) contain the Secretary's authority over prices handlers shall pay, prices producers shall receive, and the method of payment thereof. (5)(A) permits the Secretary to classify milk in accordance with the form in which it is used, and fix or provide a method for fixing minimum prices for each classification which *all* handlers shall pay,[10]

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*orders dealing with the enumerated commodities.*" 74th Cong. 1st Sess., May 3, 1935, Cal. Day July 13 (Emphasis added).

See also *Brannan v. Stark*, 342 U.S. 451, 72 S. Ct. 433, 96 L. Ed. 497 (1952). Justice Clark stated at footnote 16, page 465:

"The statutory provisions setting forth the terms which might be included in marketing orders were first enacted in an amendment to the Agricultural Adjustment Act in 1935. 49 Stat. 753. This enactment occurred shortly after the decisions of this Court in Panama Refining Co. v. Ryan, 293 US 388, 79 L. ed 446, 55 S. Ct. 241 (1935), and A.L.A. Schechter Poultry Corp. v. United States, 295 US 495, 79 L. ed 1570, 55 S. Ct 837, 97 ALR 947 (1935), placing limitations on the delegation of rule-making authority to administrative agencies. *With these cases specifically in mind, Congress set forth with deliberate particularity and completeness the terms which the Secretary might include in marketing orders.* HR Rep No 1241, 74th Cong., 1st Sess 8; S Rep No 1011, 74th Cong., 1st Sess. 8." (Emphasis added).

[8] 7 U.S.C. 608c(1) et seq.

[9] 7 U.S.C. 608c(7)(D). See *U. S. v. Rock Royal Cooperative, Inc., supra.*

[10] *Kass v. Brannan*, 196 F. 2d 791, C.A. 2 (1952), cert. denied, 344 U.S. 891.

subject only to adjustments for volume, grade and location, none of which factors are here involved.

Section 8c(5)(B) authorizes the Secretary to choose one of two methods by which producers delivering milk to handlers shall be paid. The first is known in the industry as the *individual handler pool* method, whereby all producers delivering milk to the same handler receive an average price computed by dividing the total of the class values of the milk received by the handler by the amount of the milk shipped to him by his producers. The second, commonly referred to as the *marketwide pool*, and the one in use in the New York-New Jersey Milk Marketing Area, permits the Administrator to create a pool composed of the total of the class values of all the pool milk and the payment to producers of an average or blend price, calculated by dividing the total use value by the amount of the milk in the pool. Under the marketwide pool system, any handler whose milk is disposed of at a use value less than the market average draws sufficient funds from the pool to enable his producers to receive the average market price, and any handler whose individual use value exceeds the market average contributes the overage to the pool.[11]

Section 8c(5)(C) contains the machinery necessary to establish the pool. Sections 8c(5)(E) and (F) apply specifically to cooperative marketing associations and are not here in issue.

The statutory plan contemplated that the Secretary of Agriculture would prescribe uniform minimum prices which all handlers would be required to pay for milk disposed of in a given marketing area, and uniform minimum prices all producers should receive for that milk, either on an individual handler pool basis or marketwide pool basis.[12]

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[11] 7 C.F.R. 927.75 et seq.

[12] See *United States v. Rock Royal Cooperative, Inc., supra,* at page 572:

> "The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize

The plan was refined still further by the provisions of 8c(5)(D) and (G). 8c(5)(D) imposed a restriction upon a producer who was not a regular shipper to a handler during the 30-day period preceding the effective date of an Order. It was provided that for a period of approximately 2 months beginning with the first regular delivery by such producer, his milk should be priced at the lowest use classification price.[13] Thereafter, however, he became a full participant in the pool. With this exception, all producers shipping to all handlers were entitled to uniform prices for their milk.[14]

It is not beyond the mark to say that the paramount and overriding intent of Congress was that *all handlers* and *all producers* identified with the sales of milk in a given marketing area should be accorded uniform treatment insofar as prices paid by handlers and prices received by producers were concerned. And, in fact, equity demands no less.

Congress, having thus provided for uniform application of the advantages to be gained by the stabilization of milk prices in a given marketing area, then turned its attention to the safeguards necessary to afford equal protection and opportunity under the law. The Congressional intention in this regard is spelled out and clarified in Section 8c(5)(G), where the Secretary was directed to issue no order which would prohibit the marketing of any milk in a given milk marketing area that was produced in any production area in the United States. Congress was well aware that systems of statutory regulation can be used and misused to benefit one segment of the economic society at the expense of others, or unwittingly converted to the advantage of a few. Although the Secretary

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the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing."

[13] See *Hood v. DuMond*, 336 U.S. 525, 544; 93 L. Ed. 865, 877 (1949).

[14] *Brannan v. Stark, supra*, at page 463.

was permitted to impose milk regulation on a regional basis from market to market, he was specifically directed not to develop milk orders which would prohibit milk produced in any production area in the United States from having its opportunity to be sold in any marketing area in the United States by virtue of any of the provisions in his Orders.[15] With this provision the statutory plan is complete. Its concepts are simple in nature and equitable. Complexities arise only when the Secretary leaves the confines of the fundamental purposes of the statute. The basic problem was recognized to be one of price, and no discrimination was permitted against any handlers or any producers.

### B. Legislative History of the Act

The legislative history surrounding the enactment of this statute leaves no doubt as to the intention of Congress. In the early 1930's prices paid producers for milk had become seriously demoralized throughout the entire country so that the supply and quality of milk were seriously threatened. This Act was one of a number designed to cope with the economic chaos which had developed in American industry and agriculture.

In the case of milk, Congress felt that if minimum prices for milk were guaranteed, nothing further would be required, and the Act confers upon the Secretary no powers in the case of milk other than those pertaining to the establishment of minimum prices.

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[15] *Hood v. DuMond, supra*, at pages 539 and 544:

> "Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his export, and no foreign state will by customs duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any."

The Congressional intention is expressed in the debate on H.R. 8492, and in the House, Senate and Conference Committee Reports on the Bill. Representative Jones, Texas, was the Floor Manager for the Bill. Time and again, he states in answer to questions and in his supporting statement, that no barriers may be imposed under the Act to hinder the free flow of milk and milk products into the marketing area which will subsequently be established by its terms. He said, "There is nothing in the Bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply with in that region . . . He [the Secretary of Agriculture] cannot set up any trade barriers which would keep them out . . . The amendments require a uniform price and uniform set of conditions and fair distribution. In the first place, I do not believe we could give authority to set up these barriers. In the second place, the Bill does not do that."[16]

Representative Andreson, Minnesota, said, "This Bill . . . does not give the Secretary the power to set up any marketing areas or trade barriers to stop free flow in commerce of any commodity covered by the marketing agreement or order section. My fear was that dairy products produced in the Middle West would not be permitted to be sold in the large consuming areas of the East. This feature has been definitely eliminated from the bill . . . The farmers out in our section will have to meet the grade and the sanitary requirements of the state of New York or the other states, but there is nothing in the bill that stops free flow in commerce of any commodity within the United States."[17]

Representative Andresor stated further, "One of the things we have to contend with is the fact that every State, during this depression period, has been setting up barriers, in spite

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[16] Cong. Rec. Vol. 79, 74th Congress, 1st Session, 1935, Page 9462.

[17] *Ibid* 9480.

of the Constitution of the United States, to prohibit the introduction into another State of products that it raises in its own State. It is high time we set our foot down on that . . . this is the one place where we can very well afford to put an end to it . . ."[18]

In an abundance of caution, Mr. Andreson, so that there should not at some future time be any misconstruction of the language, offered an amendment to the bill, which was subsequently incorporated in the final enactment as Section 8c(5)(G). Representative Jones, in a discussion of the Andreson amendment, declared, "Mr. Chairman, I will state that I think that is the meaning of the language as we have it now, but I have gone over it with several members of the Committee at the gentleman's [Mr. Andreson's] suggestion. It is simply clarifying and I have no objection to the adoption of the amendment."[19]

Again, Mr. Jones answering a query from Representative Boilean, stated categorically that there was nothing in the Bill giving the Secretary of Agriculture or anyone else power to restrict the free flow of milk or any other commodity between the various states.[20]

### C. The Contested Provisions of Order No. 27 Nullify the Statutory Plan Designed by Congress

Order No. 27 [21] which regulates the handling of milk in the New York-New Jersey Milk Marketing Area, is directly in issue in this litigation. Examination of its compensatory payment provisions shows that the Secretary of Agriculture disregarded the clearly stated intention of Congress.

The Secretary, despite the admonition to establish uniform use prices to be paid for milk sold in the marketing area by *all* handlers, created two classes of handlers: pool plant han-

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[18] *Ibid* 9493.
[19] *Ibid* 9572.
[20] *Ibid* 9572.
[21] 7 C.F.R. 927.1. et seq.

dlers, and non-pool plant handlers, both of whom sell fluid milk in the marketing area. Handler is defined (7 C.F.R. 927.7) *inter alia*, to include "any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area". The Secretary at the offset seemed to recognize the Congressional direction to apply the same regulations to all handlers. This broad definition, however, breaks into discriminatory and unreasonable classification under the delimiting definition of "pool plant" (7 C.F.R. 927.25-.29), since prices to be paid by pool plant handlers are computed by one formula (7 C.F.R. 927.65-.66) while payments by operators of non-pool plants are computed by another. The two formulae cannot produce uniformity except by sheer accident.

Pool handlers were made subject to the class prices fixed by the Secretary. The non-pool handler, on the other hand, was made subject to Section 927.83 of the Order, which imposed an obligation on him totally unrelated to that required of the pool handler. It is demanded that, in addition to the price he pays for milk, he make a penalty payment to the pool, measured by the difference between the Class III or manufactured price, and the Class I or fluid price established in the Order.[22] It is apparent that the Secretary's action was at complete variance with the plain provision of 8c(5)(A) that class prices for milk sold in the market shall be uniform as to all handlers. [23]

To be lawful and valid any price action with regard to a handler of milk must be within the authority granted in Section 8c(5)(A) of the Act. If there is no authority in that section, none can be found in any other section. 8c(5)(A) demands that uniform class prices be paid by *all* handlers, and no distinction is made in the Act among any who market milk in the area. The Secretary's right of classification, whatever it may be, does not entitle him to amend the statute

[22] C.F.R. 927.83.

[23] *Kass v. Brannan, supra.*

or set aside the legislative intention to deal with all handlers uniformly.

In Order No. 27, the Secretary has also by definition made a distinction between one set of milk producers and another. Sections 8c(5)(B)(i) and (ii) of the Act require that *all* producers shall be paid uniform prices for their milk sold in the marketing area. Albeit the method of payment may be either by means of a marketwide pool or an individual handler pool, nevertheless the handler's payments for milk must be uniform. The legislative history, *supra*, makes abundantly clear that this matter was of grave concern to Congress at the time the Bill was enacted. It was considered possible by some of the lawmakers that attempts would be made to discriminate against various groups of producers, located outside the marketing area. It was also the unequivocal determination of Congress that any milk which entered the market should return to the producers the minimum prices established in the order applicable to the marketing area within which the milk was sold, adjusted only by the costs of moving that milk to the market. Thus, the use of the phrase, "for the payment to all producers . . . of uniform prices . . . " has great significance.

Section 927.83 of Order No. 27 could scarcely be more inconsistent with the plain Congressional intention. By a requirement that handlers designated by the Secretary as non-pool handlers contribute the difference between the Class III and the Class I prices to the New York Equalization Pool on all milk sold within the marketing area, a group of producers who have nothing to do with the production of the milk thus sold in the market, receive a part of its value as a gratuity. If the producer who ships to a non-pool handler wishes to continue marketing his milk in the area, he will find that only a part of the value of his milk, i.e., the manufactured value, will be paid to him, and the remainder to the marketwide pool for the benefit of producers who had nothing to do with its production. This anomalous result is achieved by the

simple device of defining a *producer* as a farmer who produces and ships milk to a pool plant, and a *dairy farmer* as a farmer who does not ship milk to a pool plant. The plan is clearly discriminatory. The "producer" sells milk in accordance with one set of regulations and prices, and the "dairy farmer" sells milk under a different set of requirements and prices, even though both the "producer" and the "dairy farmer" furnish milk for the same marketing area.

There is no doubt as to the results that have been produced by the use of the compensatory payment and penalty plan. It has created an impregnable wall around federal milk marketing areas which prohibits the entrance of outside milk and outside handlers. It also precludes handlers from maintaining their historical sales position in the market. The entire structure of uniformity is destroyed by a compensatory payment provision in a marketing order. The producer of milk subjected to it will either be deprived of a part of the value of the milk to which he is justly entitled, or the handler will be forced to pay a price higher than other handlers with whom he must compete for sales in the area, as in the case here presented.

This device is, therefore, inconsistent with and directly contrary to the mandate of Sections 8c(5)(A) and (B), and no authority for its use is contained therein. Being inconsistent with and violative of these sections, it is not authorized by Section 8c(7)(D), which permits provisions to be included in an order which are "incidental" to the specific powers delegated in Section 8c(5) of the statute, but only if they are "not inconsistent with" and not repugnant to those provisions.

## III. Section 927.83 of Order No. 27 Violates the Requirement of Uniform Prices in Section 8c(5) of the Act

Section 8c(11) directs the Secretary of Agriculture to issue orders applicable to the handling of various agricultural commodities on a regional basis, giving "due recognition to the

differences in production and marketing of such commodity or product in such areas."[1] Except in the case of milk it is provided that such orders shall be limited in their application to the smallest regional production areas or regional marketing areas which the Secretary finds practicable.

If we assume in this section of the argument that a properly designed compensatory payment provision is valid, it becomes important to determine the result sought to be achieved by the use of such payments. It will be demonstrated that Section 927.83 [2] fails to serve the purposes which agricultural economists, and the Secretary himself, ascribe to compensatory payments.

It has been stated that compensatory payments should be designed "to insure that unregulated . . . plants which sell milk within a regulated marketing area will be required to pay at least as much as those who are under the regulation," that such payments were "to protect handlers from indiscriminate competition" and that they should bring about " . . . an equality of opportunity between those in the pool under the regulation and those who are not." [3] Another economist described a compensatory payment as "an amount fixed by certain rules as nearly as possible to bring his raw material product cost up to that of competing handlers getting their milk from fully priced and pooled sources."[4] He stated categorically that, "The purpose . . . is to equalize the cost to handlers on milk that . . . comes from Order plants . . . [and] milk from other sources that comes into the marketing area for similar uses . . . " Such payments are "not for the purpose of keeping milk out of the market."[5]

In the case of *Kass v. Brannan*,[6] the Court of Appeals for the Second Circuit, dealing with the compensatory payment

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[1] 7 U.S.C. 608c (11).
[2] 7 C.F.R. 927.83.
[3] Dr. Leland Spencer, R. 661a, 665a.
[4] Dr. C. W. Pierce, R. 392a.
[5] Dr. C. W. Pierce, R. 889.
[6] 196 F.2d 791 (1952) cert. denied, 344 U.S. 891.

question under Order 27, set forth a statement of the purpose of compensatory payments at pages 793 and 794 of its opinion. The opinion holds:

> ". . . In brief these auxiliary provisions provide that handlers of non-pool milk and non-pool milk products disposed of in the marketing area are required to make payments to producers, through the producer settlement fund. The purpose of these provisions is, in the words of Mr. Weldon, a witness at the promulgation hearing, 'to insure that the minimum cost [of non-pool milk, cream, etc.] to handlers is the same as the regular class price to handlers of milk received at pool plants. * * * ' The effect is to add an additional cost to the original price of the non-pool milk or milk product which is paid by handler not to the seller or original producer, but to the regular suppliers of the New York market who did not deliver the milk or milk products to him . . ."

In that case Judge Learned Hand wrote a dissenting opinion, but expressed agreement with the obvious purpose of compensatory payments subscribed to by the majority of the court and all persons familiar with the problem of peripheral milk. At page 798, Judge Hand made this observation:

> ". . . Another method was to impose upon a 'non-pool' handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool.' The provisions in suit were promulgated to effect this purpose; and *I shall assume that they can be defended only on that ground* . . ." (Emphasis added.)

It was not until the United States Court of Appeals for the Third Circuit handed down its opinion in the instant case [7] that a contrary opinion concerning the purpose of compensatory payments was expressed by an Appellate Court. Judge McLaughlin flatly disagreed with the holding of the *Kass* case,[8] and held that use of the *Kass* formula of equaliza-

[7] 287 F.2d 726 (1961), R. 897.

[8] *Ibid.*, R. 902.

> "This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress."

tion "would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers." The Court's theory was that the Secretary of Agriculture was authorized to distinguish between pool and non-pool plants and that compensatory payments were "designed to compensate the pool for the loss of the Class I fluid milk utilized . . . (and) protect the uniform blend price in the marketing area."[9] It clearly sustained the use of compensatory payments in Order No. 27 to close the New York market to all producers and handlers located outside the New York Marketing Area. Its opinion represents the outer extremity to which protection of local handlers and producers can be extended. It excludes all other handlers and producers throughout the rest of the United States,[10] and even drives from the market handlers and producers who have been a part of it for more than a quarter of a century. The Court misinterpreted the intention of Congress entirely. It is clear that Congress desired to protect the local area from the influx of cheap milk, but not to close the market; to guarantee fair competition, but not to grant a monopoly.

The Hearing Examiner in the administrative proceeding, an independent referee experienced and familiar with controversies under the Agricultural Marketing Agreement Act, who presided at the administrative hearings in both the *Kass* case and the present case, and the District Court below, recognized that uniformity was the end to be achieved by compensatory payments,[11] and that the contested provisions failed in this purpose.

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[9] *Ibid.*, R. 903.

[10] *Ibid.*, R. 906.

> " . . . its [§ 8c(5)(A)] only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area . . . "

[11] "17. There is testimony in the record of the following:

(a) The purpose of compensatory payments is to see that unregulated plants selling milk within the area pay at least as much as regulated plants; to protect handlers and producers against cut

The question then becomes whether Section 927.83 of Order No. 27 by which the Secretary imposed a payment measured by the difference between the Class I fluid price and the Class III manufactured price upon Petitioners, non-pool handlers under the terms of Order No. 27, was discriminatory and contrary to the statutory requirement of uniformity and in conflict with the purposes sought to be achieved by such payments.

Section 8c(5)(A) authorizes the Secretary to classify milk and fix, or provide a method for fixing, minimum class prices which all handlers shall pay for such milk, and which must be uniform as to all handlers. As the Court in the *Kass* case says at page 795: "The immediate object of the Act is to fix minimum prices for the sale of milk by producers to handlers".[12]

There is no distinction in the statute between pool and non-pool handlers. The Secretary, by the use of certain formulae, established a method for fixing minimum class prices for pool handlers. He just as certainly fixed a minimum Class I price for non-pool handlers by providing in Section 927.83 [13] that such handlers would be required to add to the price actually paid for milk an additional amount measured by the difference between the Order No. 27 Class III and Class I-A prices, such amount to be paid into the New York Market Equalization Pool. In the case of pool handlers, application of the formulae produces varying prices from month to month. Similarly, use of the method specified for non-pool handlers produces varying prices from month to month. Despite the different methods employed, the Statute demands that the resulting prices or costs to both pool and non-pool handlers be uniform. The fundamental statutory standard of uniformity of pricing applies to all *handlers*.

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rate milk; to give equality of opportunity; and to permit, by partial regulation, an outside dealer selling milk both in and out of the area to operate on an equal footing with fully regulated dealers (P.H.R. 15,020-15,029, 15,240-15,244)." R. 48a.

[12] *Kass v. Brannan*, 196 F.2d 791, 795, C.A. 2 (1952).

[13] 7 C.F.R. 927.83.

The statute does not prescribe meaningless standards for the Secretary. By this section, Congress intended to provide that the minimum prices payable by all handlers for milk utilized in the marketing area should be uniform so that no one group of handlers would enjoy either an unfair advantage or suffer an unfair disadvantage.

To avoid any ambiguity subsection 8c(5) contains the significant statement that the terms and conditions specified in the section "and no others" may be included in an order. Nowhere in section 8c(5) or any other section of the Act can authorization be found for the inclusion of a compensatory payment provision in a milk order which will advantage or disadvantage any handler of milk in the area.

The *Kass* case deals carefully and definitely with the statutory requirement of uniformity. At page 796, the Court states the basic objection to the "compensatory" payment provision of Order No. 27:

> "*We think that the payments required by Section 927.9(h) of the Order are part of the 'minimum price' as that term is used in section 8c(5)(A) of the Act.* The price of non-pool cream or condensed milk to a New York handler is in reality composed of two elements: (1) the initial cost, i.e., the amount paid to the seller, and (2) the amount of the penalty required to be paid under the Order. Section 927.9(h)(2)(ii) assumes that the initial cost of the non-pool cream and condensed milk will be the Class IV-A (butter) price under the New York order. If this assumption were true, the minimum prices of pool and non-pool cream and condensed milk would be the same and would satisfy the requirement imposed by section 8c(5)(A) that 'Such prices shall be uniform as to all handlers . . .' *However, there is no substantial evidence in the record of the promulgation hearings which would indicate that the initial cost of non-pool cream and condensed milk would be the New York Class IV-A price. In fact, the only evidence bearing directly on this question supports the conclusion that the initial cost would be more than the New York Class IV-A price. Therefore, the result of the exaction of a penalty computed on the basis of the New York Class IV-A price rather than the actual*

*cost to the handler is a price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York Marketing Area.* This in our opinion is contrary to the requirement laid down in section 8c(5)(A) that the minimum prices for each use classification shall be uniform as to all handlers.". (Emphasis added.)

An examination of the prices at which milk is available to non-pool handlers, such as Petitioners, for milk disposed of by them in the marketing area is necessary to determine whether the standard of uniformity among handlers has been violated and to what extent. The Findings of the Hearing Examiner in the administrative hearing under Section 8c(15)(A) are clear on this point. He found that in the Allentown-Easton-Bethlehem, Pennsylvania area "the competitive unregulated price of milk . . . is the Order No. 27 blend, or slightly higher (13,401, 14,107, 14,983-14,987, 15,240, 15,269, 15,346, 15,371-15,373, 15,544)," and that "Milk is bought for fluid use in the unregulated and semi-regulated areas in and near Northern New Jersey at slightly above the Order No. 27 uniform price (14,993)."[14] He concluded that the evidence in the promulgation hearing was that the price at which unregulated milk was available to Petitioners was not the Order No. 27 Class III price, but the Order No. 27 blend price or slightly higher.[15] The blend price, being an average market price, is always substantially higher than the Class III price.

The milk marketing specialists and economists testified in the Promulgation Hearing that the prices paid by handlers outside the area for milk sold into the area were the market blend price or something in excess thereof and that milk was not available to handlers at the Order No. 27 Class III price.[16] The Secretary himself in his Amendatory De-

[14] R. 49a.

[15] R. 55a.

[16] Dr. Dorris D. Brown, R. 598a; Dr. Leland Spencer, R. 653a-655a; Dr. Edmund Vial, R. 667a.

cision recognized these facts and conceded that in the case of the Allentown-Easton area prices required to be paid by producers were higher than the New York Order blend price.[17] Petitioners' pay prices are *much* in excess of the blend or average Order No. 27 price.

The District Court below found:

> "The government cannot argue (nor has it attempted to argue) that the total cost to the plaintiffs of the liquid milk which they sell in northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the *total* cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said § 608c(5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*"[18]

The Court relied in part upon a misconception of Section 8c(5)(B)(ii) to support its limited definition of handler and producer in Section 8c(5)(A). The provisions of Section 8c(5)(B) are completely satisfied by imposing all of the pricing and pooling provisions of Order No. 27 upon producers' milk sold in the marketing area through any and all handlers. This method was approved in the *Rock Royal* case. In that case the Court discussed milk sold in the marketing area as priced milk and milk sold out of the area as unpriced milk, and held at page 566: "We are of the view that there is no discrimination by reason of this situation." In the present case, there is no unpriced milk whatsoever, as it is priced by the Pennsylvania Milk Control Commission and Federal Order No. 61. This subjects Petitioners to an even greater inequity than that in the *Rock Royal* case.

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[17] R. 708a.

[18] R. 225a.

Inasmuch as the concept of pool and non-pool handler was something contrived by the Secretary after the Act had been passed by Congress, there is no basis for the assertion by the Court below as follows:

> "But there is not the slightest indication that Congress used the language of Section 8c(5)(A), with the thought of providing for equalized costs between pool and non-pool handlers. . . ." [19]

There is certainly no reason to believe that Congress could anticipate that the Secretary would so boldly disregard the legislative intention.

In view of these facts, the District Court held the compensatory payment provision a violation of the requirement of uniformity of pricing in the Agricultural Marketing Agreement Act.

The Court below, in the present case, treated as totally immaterial the facts found by the Hearing Examiner, not reversed by the Judicial Officer, and found by the District Court that the prices paid for milk by Petitioners were higher than those paid by its pool plant competitors. The Court reached its conclusion by holding that the Act, when it provided in Section 8c(5)(A) that for milk sold in the marketing area "such prices shall be uniform as to all handlers," in fact meant, "such prices need only be uniform as to all pool handlers."

The Court of Appeals made no attempt to distinguish the holding of the *Kass* case, *supra*. It disposed of that case by merely stating its disagreement.

Granting the contention, pro arguendo, that Section 8c (5)(A) imposes the standard of uniformity only with reference to pool handlers and that 8c (5)(B) provides for uniform payments only to producers who ship their milk to pool plants, it must be inquired what standards do control the Secretary's regulation of the prices or costs of milk for non-pool handlers, and in what section of the Act such standards

[19] R. 904.

appear. Once the standard of uniformity in Section 8c(5)(A) is held inapplicable, the argument must be that the Secretary has full power to regulate non-pool handlers without reference to any standards whatsoever. This would be a rejection of the principle set forth in the case of *United States v. Rock Royal Cooperative, Inc., supra*, where this Court affirmed that the delegation of legislative authority in the Agricultural Marketing Agreement Act was valid *because of the precise standards appearing therein.*

The only possible conclusion must be that Congress intended precisely what it said, i.e., that minimum price regulations could be imposed upon all handlers connected with the market, but always in accordance with the standard of uniformity. There is no basis for the Secretary's qualification of the phrase "uniform as to all handlers" and his interpretation that uniformity has no application to "some" handlers. It appears, therefore, that the imposition of the "compensatory" payment provisions of Order No. 27 upon Petitioners and other handlers similarly situated, is in direct violation of the uniformity requirement in Section 8c(5)(A), as it was in the *Kass* case.

Counsel for Respondents will argue that Section 8c(5) does not require payment of minimum prices for milk received from "dairy farmers" at non-pool plants and that the Statute differentiates between a handler of milk receiving milk from "producers at a pool plant" and a handler receiving milk from "producers at a non-pool plant". In the *Kass* case, at p. 795, the Court said:

> ". . . The Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market . . ."

The Statute uses the words "farmer" and "producer" interchangeably.[20] The concern of Congress was for all farm-

[20] e.g. The declarations of conditions and policy, 7 U.S.C. 601 and 602, refer to "purchasing power of farmers" and "prices to farmers".

ers, not some group artfully described as "producers" by the Secretary. The Court in the *Rock Royal* case, *supra*, at pages 543-546, quotes Sections 1 and 2 of the statute with its reference to "farmers" at an early point in its opinion, when passing upon the validity of Order No. 27. Consequently, at page 547, in speaking of the same group of persons, it uses the term "producers". In the case of *Stark v. Wickard*,[21] the United States Supreme Court speaks of "farmers producing milk", or "dairy farmers" as producers. When the case again came before the Supreme Court, involving identically the same litigants in the case of *Brannan v. Stark*,[22] Justice Clark spoke of the moving parties as "dairy farmers", and later at page 453, in speaking of the same persons, used the word "producers". It is, therefore, evident that the Supreme Court and Congress, in using the words "farmers", "dairy farmers" and "producers" were referring to the same persons.

The Secretary of Agriculture has no authority to change, limit or expand the definition of a word appearing in the statute, [23] and as previously pointed out in the *Kass* case, *supra*, the expressions "producer" and "dairy farmer" were used synonymously.

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[21] *Stark v. Wickard*, 321 U.S. 288, 88 L. Ed. 733 (1944).

[22] *Brannan v. Stark*, 342 U.S. 451, 96 L. Ed. 497 (1952).

[23] *Social Security Board v. Nierotko*, 327 U.S. 358, 368, 90 L. Ed. 718, 727 (1946):

> "The Social Security Board and the Treasury were compelled to decide, administratively, whether or not to treat 'back pay' as wages; and their expert judgment is entitled, as we have said, to great weight. *The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact.* Both Hearst Publications, (322 U.S. 131, 88 L. Ed. 1184, 64 S. Ct. 851) and Gray v. Powell, (314 U.S. p. 411, 86 L. Ed. 309, 62 S. Ct. 326), advert to *the limitations of administrative interpretations. Administrative determinations must have a basis in law and must be within the granted authority. . . . An agency may not finally decide the limits of its statutory power. That is a judicial function.* Congress used a well

If the Secretary's contention were accepted, it would mean that he could designate as pool handlers those whose Class 1-A disposition in the area must be at least 85% of their total receipts of milk, and that all other milk coming into the

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understood word—'wages'—to indicate the receipts which were to govern taxes and benefits under the Social Security Act. There may be borderline payments to employees on which courts would follow administrative determination as to whether such payments were or were not wages under the act.

"We conclude, however, that the Board's interpretation of this statute to exclude back pay goes beyond the boundaries of administrative routine and the statutory limits. This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. *It is beyond the permissible limits of administration interpretation.*". (Emphasis added).

*Addison v. Holly Hill Fruit Products*, 322 U. S. 607, 617, 88 L. Ed. 1488, 1496 (1944):

"We should, of course, be faithful to the meaning of a statute. But after all Congress expresses its meaning by words. If legislative policy is couched in vague language, easily susceptible of one meaning as well as another in the common speech of men, we should not stifle a policy by a pedantic or grudging process of construction. To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of words is quite another. . . .

"'The natural meaning of words cannot be displaced by reference to difficulties in administration' . . . For the ultimate question is what has Congress commanded, when it has given no clue to its intentions except familiar English words and no hint by the draftsmen of the words that they meant to use them in any but an ordinary sense . . .

"After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

". . . Construction is not legislation and must avoid 'that retrospective expansion of meaning which properly deserves the stigma of judicial legislation' . . ."

area through non-pool handlers would be subject to "compensatory" payments, which the Government contends are not controlled by Section 8c(5)(A) of the statute. The handlers designated as pool plants under this definition might only furnish the market with a small fraction of the fluid milk. Therefore, the Secretary would be regulating the vast majority of the fluid milk in the market without any standards whatsoever, completely ignoring the uniformity clause as it appears in the statute. Such a construction would do violence to the intent of Congress, and lead to an absurd result.

If the Opinion of the Court below is to prevail, the word "handlers" appearing in Section 8c(5)(A) is synonymous with the words "pool handlers". On this premise, a non-pool handler would not be subject to any type of regulation, inasmuch as the statute would not then deal with non-pool handlers. It is obvious that Congress meant the word "handlers" to cover all types of handlers. This conflict concerns the fundamental question of whether delegation of power to the Secretary of Agriculture is limited by the intent of Congress, or by the views of the Secretary as to the desirability of his action. The Court in the *Kass* case, and this Court in the cases of *Rock Royal* and *Brannan v. Stark, supra*, determined that which Congress intended. The Court below in the instant cases seemed to be more persuaded by the desires of the Secretary.

It is evident that Congress made no distinction between dairy farmers who ship milk either to pool or non-pool handlers. The Opinion of the Court below, if correct, would exclude from the operation of the statute all non-pool handlers and all producers who ship to or supply non-pool handlers. That being so, the Secretary could exercise no regulation, control or supervision over them. Petitioners do not claim such an exclusion. They do contend, however, that such regulations as may be promulgated by the Secretary of Agriculture shall be uniform as to prices and costs. The *Kass* case so held; the Court below flatly disagreed.

## IV. The Challenged Provisions Are not Authorized by Section 8c(7)(D) of the Act

Inasmuch as the provisions of Order No. 27 here under attack are in direct contravention of the requirement of uniformity in Sections 8c(5)(A) and(B) of the Agricultural Marketing Agreement Act, they are not saved by Section 8c(7)(D). This Section authorizes the Secretary to include as terms in a milk order those "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)-(7) of this section and necessary to effectuate the other provisions of such order".[1] The important qualification is that the auxiliary provisions thus authorized must be consistent with the terms and conditions specifically sanctioned in the statute. Compensatory payments are inconsistent with the requirement of uniformity of prices and costs to handlers and can, therefore, not be valid under either Section 8c(5) or Section 8c(7).

Any finding by the Secretary as to the necessity for such a provision is no substitute for statutory authority, here lacking. A case in point is *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U. S. 498, 93 L. Ed 1499, (1949). The F. P. C. is given wide powers over the "transportation or sale of natural gas subject to the jurisdiction of the Commission", including the incidental power to do things appropriate to carry out the Federal Power Act (p. 508). The Commission contended that it therefore had the power to approve or disapprove transfer of certain leases over natural gas reserves owned by Panhandle. Extensive administrative findings were made that, since natural gas is the "lifeblood" of a pipeline system, a company could, by disposing of its reserves, render itself unable to continue service and this without the Commission's consent. The Court squarely held that this alleged necessity of protecting the Commission's grant of authority was no substitute for the failure of Congress to grant additional authority (pp. 515-516):

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[1] 7 U.S.C. 608c(7)(D).

"If the Commission is of the opinion that it should have power to control the disposition of leases by natural-gas companies, it is authorized to call the attention of Congress to that fact."

A similar argument was made by the Secretary in the *Kass* case, *supra*. The Court rejected the argument and held that "... the penalty payments ... are inconsistent with ... 8c(5)(A) and therefore cannot be justified under section 8c(7)(D)".[2]

In *Brannan v. Stark*, this Court dismissed a contention that a contested provision of an order was authorized by 8c(7)(D), where it was claimed by the Secretary that the provision in question was fundamental and crucial to the operation of the Order.[3] In the Opinion of the Court of

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[2] "Consequently, the challenged provisions of the order under which the penalty payments were exacted are inconsistent with the terms and conditions specified in section 8c(5)(A) and therefore cannot be justified under section 8c(7)(D). As Mr. Justice Clark remarked in construing subsection (7)(D) in *Brannan v. Stark*, 342 U.S. 451, 72 S. Ct. 433, 439: 'Finally, the provisions cannot be incidental to the enumerated terms and conditions since they are inconsistent therewith.' And because of such inconsistency the court found it unnecessary to determine whether the provisions there under attack were ''necessary to effectuate the other provisions'' of the Order'. Although Brannan v. Stark is not a precise authority for the case at bar, we think it tends to support our decision.

"Since we rest decision on the ground that the provisions of section 927.9(h) of the order are inconsistent with the terms specified in paragraph (A) of section 8c(5), it is unnecessary to discuss other contentions of the parties." *Kass v. Brannan*, 196 F.2d, 797.

[3] "Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. The Secretary claims authority for the provisions in question is given by the last paragraph of this omnibus subsection, a paragraph authorizing the inclusion of auxiliary provisions 'incidental to • • • the terms and conditions specified in subsections (5), (6) and (7).' Yet it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the

Appeals for the District of Columbia in that same case, it was pointed out that no new powers could be created by this section of the Act, nor could power specifically given be enlarged.(4)

In the *Rock Royal* case, *supra*, this Court limited the scope of section 8c(7)(D) of the Act to the purposes and area obviously intended by Congress, when it said only provisions auxiliary to those definitely stated were permissible under 8c(7)(D). The specific terms permitted to be included in a milk order set forth in section 8c(5) contain none to which the contested compensatory payment provision can be "auxiliary". In fact, the disputed provision is in direct conflict with the uniformity of class price requirement set forth therein.

Even though Section 8c(7)(D) also contains the word "necessary", this avails the Secretary nothing. The purpose of compensatory payments, as appears from the record, is to protect pool handlers from an invasion of their market by non-

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whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe." *Brannan v. Stark*, 342 U.S. 451, 462; 96 L. Ed. 497, 606 (1952).

(4) "Whether the power to provide this payment to cooperatives is 'incidental' depends, of course, upon the meaning of that word as used here. The definition given in decisions has varied according to the situation and the statute or instrument to be construed (20 Words and Phrases, pp. 418-434). Probably as good a definition as any, in our situation, is 'Certainly, an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted' (First National Bank v State of Missouri, etc., 263 U.S. 640, 659, 44 S. Ct. 213, 216, 68 L. Ed. 486). By such definition, this payment is not authorized to carry into effect the powers granted the Secretary under the Act *but is opposed to the express requirement of uniform prices to producers subject only to the deductions and differentials set out in the Act.*

*"That this payment is not 'not inconsistent' is determined by what has last been above stated."* *Brannan v. Stark*, 185 F.2d 871, at 882 (1950). (Emphasis added.)

pool handlers who may be in a position to acquire milk supplies at less than the minimum prices required to be paid by pool handlers. Again the record shows that the price of milk available to non-pool handlers in this area is something higher than the New York Order blend price which dictates that the rate of compensatory payment set forth in the contested provision is much in excess of that which would be "necessary" to equalize the milk costs of pool handlers and non-pool handlers. Accordingly, the statutory requirement of "necessary to effectuate the other provisions of such order" is not met.

The Opinion of the Court of Appeals in the case at bar apparently upholds the validity of the compensatory payment provisions in Order No. 27 on two principal propositions. First, Section 8c(5)(A) of the Act and its requirement of uniform prices for all handlers has no application to Petitioners, since they are non-pool handlers. Secondly, the Court holds that the provisions in question are authorized by Section 8c(7)(D) as incidental to and necessary to effectuate the other provisions of the Order. Price regulation of handlers cannot be achieved by application of 8c(5)(B) through (G), but only under 8c(5)(A). Yet, the Court below says that even this paragraph has no bearing on or relevance to the handler price-fixing function implicit in compensatory payment provisions. If Section 8c(5)(A) is not relevant to the compensatory payment provision, the question immediately arises: what term of the Order whose provisions are limited specifically to those contained in 8c(5)(A) through (G) can the compensatory payment provision be incidental to, not inconsistent with and necessary to effectuate?

The Court has held that the standard of uniformity in 8c(5)(A) is not binding upon the Secretary in the formulation of a compensatory payment provision. If not, it is then fair to inquire, what standards do govern the exercise of this authority by the Secretary? The Court appears to hold that Section 8c(7)(D) itself is the enabling section, from which the Secretary draws the authority necessary to issue the provisions

in controversy. This section obviously contains no standards. The Opinion of the Court below leads to the inescapable conclusion that the Secretary has power and authority to regulate the actions, and particularly the prices, which bind non-pool handlers without any legislative or statutory standards whatsoever. This result is in direct conflict with the principle, followed consistently by the Supreme Court of the United States, that a delegation of legislative power in a statute without proper standards is a violation of the Constitution of the United States.

The Opinion of the Court of Appeals in the *Kass* case avoids the indefensible results reached by the Court below in this case. In *Kass*, the Court held that the Secretary's regulatory power over handlers had to be based on Section 8c(5)(A). Consequently, it had to meet the standard of uniformity. Failing that, it was inconsistent, in violation of the statute and had to fall. The Court there recognized that no new or enlarged powers could be exercised by the Secretary on any authority delegated to him by 8c(7)(D).

## V. Section 927.83 of Order No. 27 is in Conflict with Section 8c(5)(G) of the Act, Prohibits the Flow of Milk and Fosters Monopoly

In the *Kass* case, the Court of Appeals declared that the only proper limitation upon the sale of milk in the marketing area by non-pool handlers should be that required to equalize the costs of pool and non-pool handlers, thereby protecting the price structure established in the Order. Any limitation beyond that, the Court held, was a penalty upon the non pool handler and his producers, and invalid.[1]

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[1] Judge Learned Hand, dissenting in the *Kass* case, did not eliminate the need for uniformity; he merely objected to the precise standards by which the Secretary's rules were held by the majority to be circumscribed. "[I]t was not necessary that in application they should go not a jot beyond the exact purposes for which they were intended." 196 F. 2d 791, 798.

In the present case the disparity in prices is many times more aggravated than in the *Kass* case, and prohibits the entry of milk into the marketing area in direct violation of 8c(5)(G) of the Act.

This Court dealt with an analagous situation in the case of *Hood & Sons v. DuMond*, 336 U.S. 525, 93 L. Ed. 865 (1949) and clearly set forth the basic purpose and intention of Congress as expressed in paragraph 8c(5)(G). That case dealt with an action of the State of New York denying Hood a permit to buy milk supplies from New York producers for shipment into the Boston area. The justification was that the action was taken to protect local economic interests and that such restraint on interstate commerce did not violate the commerce clause of the Constitution, because the state regulation was a part of the federal regulatory scheme. The Court rejected this contention at pages 544-545. In discussing Section 8c(5)(G), it was stated:

> "These sections and [Senate and House] reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C.A. § 601, 2 FCA title, § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It can claim neither federal sponsorship nor congressional sanction."

By the use of compensatory payments sales in the New York-New Jersey Milk Marketing Area have become the exclusive domain of local handlers and the group of producers who supply them. The regulation creates, fosters and perpetuates monopoly. The dominant cooperative in the market has become gigantic in size and powerful enough to tailor the provisions of the Order to protect its preferred position. It is no coincidence that it supports the validity of the preferential system with such zeal.

It is not unusual for attempts to be made to subvert the machinery of farm legislation to protect the interests of a few. The Supreme Court dealt with such a problem in the case of *Denver Union Stock Yard Company* [2] which arose under the provisions of the Packers and Stockyards Act of 1921. In that case, the Court invalidated a regulation issued by the stockyard company providing that no dealer engaged in business at the Denver Stockyard might solicit any business for other markets or endeavor to secure customers for livestock elsewhere, or in any manner divert or attempt to divert livestock from the Denver Stockyard to any other stockyard. Dealer was defined in the Act as a market agency, and it was provided that it was the duty of every market agency "to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard". The Court pointed out that the words "at such stockyard" meant at every stockyard where that market agency was registered, and that the regulations "bar both the market agency and the stockyard from performing their statutory duty".

A market agency registered at Denver was prohibited by the regulations from furnishing producers in the Denver area stockyard services at Kansas City or any other stockyard where the agency was also registered. It was a clear case in which the Denver Union Stockyard Company attempted to create a monopoly by misusing the statutory powers set up in the Packers and Stockyards Act. Justice Douglas characterized the stockyard company's argument thus:

> "The argument contra is premised on the theory that stockyard owners, like feudal barons of old, can divide up the country, set the bounds of their domain, establish 'no trespassing' signs, and make market agencies registering with them their exclusive agents . . ." [3]

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[2] *Denver Union Stock Yard Company v. Producers Livestock Marketing Association*, 356 U.S. 282, 2 L. Ed. 2d 771 (1958).

[3] *Ibid.*, page 288.

The Court quotes with approval the Opinion of the late Chief Justice Taft in *Stafford v. Wallace*, 258 U.S. 514, 66 L. Ed. 735, where it was said:

> " 'The object to be secured by the act is the free and unburdened flow of live stock from the ranges and farms of the West and the Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as live stock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.' "[4]

The Court disposed of the argument that the economics of the business had changed and that the contested regulations were required in view of modern developments, by saying:

> "If the Act does not fit the present economics of the business, a problem is presented for the Congress. . . .
> "We take the Act as written. As written, it is aimed at all monopoly practices, of which discrimination is one."[5]

The injustice wrought by the Secretary's use of the compensatory payment provisions would be serious enough if it did nothing more than prevent new handlers from marketing their supplies of milk in the Milk Marketing Area as defined by the Secretary. When, in addition to that, it actually drives handlers with long established sales and distribution out of the Marketing Area for the benefit of a carefully defined group of handlers and producers, its true motivation is unmasked.

## VI. Petitioners Are Not Estopped from Challenging the Compensatory Payment Provisions of Order No. 27.

The Petitioners became subject to Order No. 27 by virtue of the amendment of August 1, 1957. The order granted

[4] *Ibid.*, page 289.
[5] *Ibid.*, page 289.

handlers the option, subject to certain conditions, of being either a pool or a non-pool plant, i.e., fully regulated, or subject to the compensatory payment requirements. At this time a handler had a non-pool, compensatory payment status automatically unless he affirmatively elected pool status. Petitioner Suncrest, having not elected pool status, was classified as a non-pool plant, and billed for compensatory payments. Petitioner Lehigh Valley, since it sold a larger volume of milk in the Philadelphia Marketing Area than in the Order No. 27 area, could not elect to be a pool plant. Subsequently, the Secretary issued an amendment effective September 1, 1958, which provided that handlers with the necessary qualifications should have pool plant status, unless they affirmatively elected non-pool status.

The Secretary has argued that inasmuch as Petitioners exercised an option to be non-pool plants in the reports required to be filed by the Administrator of Order No. 27, they were estopped from challenging the validity of the provisions to which their option subjected them. There is no validity in this contention. The Petitioners have at no time exercised a free option. They were directed by the United States District Court to file the reports. These reports required that the Petitioners be either pool plants or be subjected to compensatory payments. Consistent with the legal position asserted in the then pending (15)(A) review proceedings, Petitioners chose not to be pool plants. The Petitioners do not admit that other provisions of the Order which would apply to them, if they were pool plants, are valid; since they are not under those provisions they are not aggrieved by them, and have not and cannot question their validity. The administrative review proceedings were filed in good faith by Petitioners on the first day permitted by law, and Petitioners have diligently pursued their rights under Sections (15)(A) and (15)(B). It would render the right of judicial review meaningless if Petitioners were precluded from testing a provision to which they were involuntarily subjected under these circumstances.

The 1958 amendment was issued while these cases were pending, and seems to have been an attempt to render it im-

possible for these handlers to argue the validity of the compensatory payment provisions which they had theretofore attacked. The argument was immediately offered by the Secretary that Lehigh Valley and Suncrest, having elected to retain non-pool status rather than pool status, had by their own voluntary choice estopped themselves from questioning the validity of the compensatory payment provisions.

The Secretary, in his Findings in support of the 1958 amendment, pointed out that the change in the nature of the election provision "would not change the economic position of a plant".[1] He stated further that non-pool status should be established only as a result of positive choice on the part of a handler in view of "the resultant prospective or possible obligation for compensatory payments . . ." [2]

The election offered by the 1958 amendment afforded the Petitioners no opportunity for a free choice between pool and non-pool status. Their position on the effective date of the amendment was no different than the position they took the first day they came under the provisions of Order No. 27, i.e., that the compensatory payment provisions set forth in Section 927.83 of the Order were invalid. Petitioners elected to continue their non-pool plant status. Their election, regardless of the amendment of 1958, bound them to comply only with a valid and lawful compensatory payment provision. Section 927.83 was not such a provision at its inception and did not become so on September 1, 1958, since it was not changed or amended in any manner.

The District Court below held on this point as follows:

> ". . . Thus, if the compensatory payment provisions are struck down, no money should be paid the Market Administrator under those provisions. This is true regardless of whether plaintiffs were nonpool plants *by choice or by necessity*, unless we were to hold that by striking down the compensatory payment provisions, the

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[1] 23 F. R. 6054.

[2] *Ibid.*

> Court automatically forced the plaintiffs into a fully regulated status under the terms of the September 1, 1958 amendment to Order No. 27. We flatly reject this conclusion. It may be that the Secretary could enforce full regulation upon handlers such as the plaintiffs by an appropriate order. See *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3rd Cir. 1949), cert. denied 338 U.S. 905. We do not feel that by promulgating the September 1, 1958 amendment granting handlers an 'election' between full and partial regulation, he intended to do so." (Emphasis added). (R. 229a).

Since the Congressional delegation of power to the Secretary did not include a right to designate one set of handlers as pool and the other set as non-pool and impose non-uniform regulations upon them, the Secretary himself has no authority to delegate to an individual handler the right to determine for himself whether he will be a pool or non-pool handler. We are dealing here with a basic lack of statutory power which, if not granted by Congress to the Secretary, cannot be supplied under any theory of estoppel.[3]

The Secretary contends that inasmuch as the Act confers upon him authority to regulate all handlers fully,[4] Petitioners cannot be heard to complain if only partial regulation is imposed upon them. The authority of the Secretary to regulate Petitioners fully is not before the Court in this controversy. It may well be that such power does, in fact, *not* reside in the Secretary at all *with regard to these Petitioners.* That question need not and cannot be decided in this litigation. The

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[3] There can be no substance to the idea that, having selected one of two proffered choices, Petitioners are thereby estopped from challenging incidents which flow illegally from the chosen position. See *Stark v. Wickard*, 321 U.S. 288, 304, 88 L. Ed. 733, 744, (1944):

> "It cannot be fairly said that because producers may choose not to sell in the area, those who do choose to sell there necessarily must sell, without a right of challenge, in accordance with unlawful requirements of administrators."

[4] *Titusville Dairy Products Co. v. Brannan*, 176 F.2d 332, (1949) cert. den. 338 U.S. 905, 94 L. Ed. 557.

only relevant question is whether the Secretary has authority to impose the contested assessment upon Petitioners. Whatever may be his plenary powers, the Secretary may not under the guise thereof impose invalid requirements upon Petitioners in any form. Every administrative action of the Secretary must be in accordance with the power and authority granted him in the Act, and must be executed in conformity with the standards therein contained.

## VII. The Credit Provision of Federal Order No. 61, the Order Regulating the Handling of Milk in the Philadelphia Milk Marketing Area, Does Not Validate the Compensatory Payment Provisions of Order No. 27

Petitioner Lehigh Valley is fully regulated by the terms of another Federal Order, i.e., Order No. 61, effective in the Philadelphia Milk Marketing Area.[1] Petitioner Suncrest Farms, Inc., on the other hand, is a handler regulated by no other Federal Milk Marketing Order. The Secretary argues that in view of this difference and the inter-relationship of certain provisions of Order No. 61 and Order No. 27, the requirements of uniformity under Section 8c(5)(A) have been met, and the compensatory payment provision of Order No. 27 must, therefore, be valid insofar as Lehigh Valley is concerned.

Section 83 of Order No. 27 [2] provides, *inter alia* that the compensatory payment shall be the difference between Class I and Class III prices where another Federal Order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other Order. This the Philadelphia Order does.[3]

The result is that a milk handler who is fully regulated under Order No. 61 is obligated to pay for milk disposed of in the New York Marketing Area the Order No. 27 Class

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[1] 7 C.F.R. Part 961.

[2] 7 C.F.R. 927.83.

[3] 7 C.F.R. 961.53.

I-A price. A part of that price, the difference between the Order No. 27 Class I and Class III prices, he pays into the New York equalization pool for distribution among the 50,000 producers who make up that pool, of which his producers are not a part. The balance only would remain for payment to the farmers who produce the milk and from whom he purchases and receives it.

The issuance of such orders by the Secretary is completely inconsistent with the position he now takes before the Courts that Section 8c(5)(A) has no application to prices to be paid by non-pool handlers. If as the Secretary now contends there is no requirement of price uniformity with regard to non-pool handlers, it is fair to inquire why he found it necessary to make provision by amendment of Order No. 61 for any credit provision whatsoever. The only reasonable explanation is that the Secretary at that time, in view of the legislative history, the judicial decisions on point, and the well considered opinions of all those familiar with the operations of the Agricultural Marketing Agreement Act, recognized his obligation under the Act to regulate all handlers, pool and non-pool, in a uniform manner.

The Secretary's issuance of the credit provision of Order No. 61, however, did not produce price uniformity between pool and non-pool handlers under Order No. 27. Price uniformity can only be achieved, even under the credit provision, if the non-pool handler can acquire the milk needed for his sales in the New York Marketing Area, by payment to his producers of the New York Class III price for it. The District Court in the instant cases found no milk available to Petitioners at the Class III price [4].

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[4] R. 223a, footnote 9:

"The government makes much of the fact that plaintiff Lehigh Valley Cooperative Farmers, Inc. which has also been regulated under Federal Order No. 61 for Philadelphia since July 1, 1957 and is thereby charged compensatory payments pursuant to § 927.83(b)(1), rather than § 927.83(b)(2) which regulates the compensatory payments of plaintiff Sunerest Farms, Inc. Actually the amount of compensatory payments

The credit provisions are also inconsistent with the provisions of Section 8c(5)(B) of the Act, which requires that prices received by producers for their milk must be uniform. In fact, the credit system makes it absolutely impossible to achieve uniformity of producer returns for the milk shipped into the marketing area. The milk of both pool and non-pool producers is sold in the marketing area for fluid use but the prices they receive are entirely dissimilar. The New York pool producer is paid the Class I price through the operation of the equalization pool, plus his share of the compensatory payment increment involved in the sale of the other producers' milk. By virtue of the Secretary's order the outside producer must be satisfied with the New York Class III price.

## VIII. Section 927.83 Provides for Penalties, Not Compensatory Payments, and As Such Violates Section 8c(5)(A) and 8c(5)(G) of the Act

A realistic evaluation of the "compensatory" payment provisions here under attack will quickly dispel the fiction that they are designed to equalize handlers' costs. They stand exposed as penalty payments to exclude non-pool handlers from the market. The "compensatory" payment here is approx-

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for each will be the same, since § 927.83(b)(1) specifically provides that payments under that section 'shall be at the rates set forth in subparagraph (2) (i.e., Sunerest's rate) if the other Order permits . . . [certain deductions]'. Order No. 61 does permit such deductions. Therefore Lehigh Valley must also pay the difference between the Class I and Class III Order No. 27 price into that Producer Settlement Fund. Although it is then required to pay only the Class III price to its producers under the terms of Order No. 61, the uncontroverted facts in this case are that it can NOT purchase raw milk from its producers at that low price and in fact is forced to pay more for it. Thus its *actual cost* plus the compensatory payment is substantially higher than the cost to fully regulated Order No. 27 handlers. This runs afoul of the *Kass* holding. For this reason we have not disinguished between the plaintiffs throughout our opinion. If *Kass* is followed, both plans seem equally objectionable."

imately 5¢ to 6¢ per quart of milk. The price which Petitioners must pay for the milk plus the addition of the "compensatory" payment would develop a cost to them 40% to 60% higher than that of their pool plant competition in the same area. In these circumstances, the only alternative offered Petitioners is withdrawal from the North Jersey market.

Throughout the *Kass* case the Court characterizes the disputed "compensatory" payment as a "penalty" upon a handler.[1] The penalty is imposed upon a handler who acquires non-pool milk for sale into the marketing area. It should be remembered that all such milk must qualify under the health and sanitation requirements imposed by the various regulatory bodies upon any milk sold in the area.

The phrase "compensatory payment" implies that Petitioners as non-pool handlers are under an obligation to compensate some one for a loss occasioned by their sales of milk in the marketing area. The compensatory payment is obviously not payment to the farmers who produce the milk marketed in the area by Petitioners. The payments are in fact made to the equalization fund for the benefit of the producers who ship their milk to pool plants. It cannot be contended that the payments are made to the pool to cover any loss suffered by pool producers since the sales made by Petitioners have been an integral part of Petitioners' regular sales and distribution pattern for many years. The fact is clear that the payments are penal and not compensatory in any regard, and are imposed upon a non-pool handler as a condition to his right to continue to sell fluid milk in the marketing area. As penalties, they are invalid, produce non-uniform prices be-

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[1] 196 F. 2d 791, at page 795:

"... The total exactions required from the plaintiff were about $10,000. His brief describes them as 'penalty' payments, as did the witnesses at the promulgation hearing and the hearing examiner in his recommendations. Carefully avoiding the word 'penalty', the Secretary's brief describes them as 'compensatory' payments, i.e., compensation for competition of non-pool milk with pool milk. We think 'penalty' is the more accurate description."

tween pool and non-pool handlers, and prohibit the flow of milk into the marketing area.

## IX. Conclusion

For the reasons above stated it is respectively requested that the decision of the Court of Appeals for the Third Circuit be reversed, that the compensatory payment provisions of Order 27, 7 C.F.R. 927.83 and 927.84, be declared invalid, and that the Petitioners be allowed to withdraw all monies heretofore paid by them into the registry of the District Court.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., AND SUNCREST FARMS, INC., PETITIONERS

v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

## BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE

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v.

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

## BRIEF OF THE STATE OF MINNESOTA, AMICUS CURIAE

Pursuant to Rule 42 (4) of the rules of this Court, the State of Minnesota respectfully tenders this brief, amicus curiae in support of the position of the petitioners Lehigh Valley Cooperative Farmers, Inc., and Suncrest Farms, Inc.

### I. QUESTIONS PRESENTED

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. § 601 et seq., (hereinafter referred to as the Act) authorizes the Secretary of Agriculture to define and regulate milk marketing areas through the adoption of marketing orders requiring distributors or "handlers" to pay to producers minimum prices for all milk sold in the regulated area. The terms and conditions of a milk order are expressly limited by the provisions of §§ 8c(5) and 8c(7) of the Act. Certain provisions of New York - New Jersey milk marketing order,

7 C.F.R. § 927.1 et seq. (hereinafter referred to as Order No. 27) impose a charge on all milk distributed by petitioners in the area regulated by Order No. 27 for payment to "producers" other than the dairy farmers who supplied the milk. The questions presented are:

1. Whether 7 C.F.R. §§ 927.83 and 927.84 of Order No. 27 contravene the Act and are an unlawful restriction on market entry.

2. Whether under § 8c(5) of the Act dairy farmers engaged in the production of milk for sale in a regulated marketing area may be denied the status of a "producer" and excluded from the benefits of the Act.

3. Whether § 8c of the Act grants the Secretary of Agriculture authority to impose a charge on "non-producer" milk prohibiting or limiting the entry into a regulated marketing area of the milk of dairy farmers who produce for sale primarily in other marketing areas.

## II. INTEREST OF THE STATE OF MINNESOTA

In 1955 the Minnesota legislature directed its Attorney General to "take such action as he deems necessary in order to contest or oppose existing statutes, ordinances, regulations, orders or other trade barriers which may restrict the sale in other states of milk or other dairy products produced in Minnesota."[1] The action was taken because of the importance of the dairy industry to the agricultural economy of the state.

Minnesota ranks second on a par with New York among the states in total milk production.[2] The annual farm cash

[1] M.S.A. §8.13 (Supp. 1958).

[2] *Milk Production, Disposition and Income*, United States Department of Agriculture, Statistical Reporting Service, April, 1961.

receipts from marketing of all milk and cream amounted in 1960 to approximately $300,000,000.[3] Of this total production, a maximum of 25 per cent can be consumed within the state as milk, cream, butter, and other dairy products.[4] The remaining 75 per cent must be marketed in the channels of interstate or foreign trade.

In 1960 dairy farmers in the United States received an average price of $4.17 cwt. for all milk and cream marketed.[5] The Minnesota average was $3.07 cwt. for milk marketed in all forms. While ranking second in terms of total production, Minnesota ranks fifth in terms of gross income from dairying. The disparity may be emphasized by the fact that Florida produces only one-ninth as much milk as Minnesota but receives for that milk almost one-third of Minnesota's total income from dairying.

There are over 35 major markets in the United States where the price of milk for bottling purposes exceeds the price paid by dealers in Minnesota by more than the cost of transportation to those markets.[6] Such markets are not responsive to price competition because of intermarket barriers which take the form of restrictive sanitary regulations, state milk control laws and certain provisions of federal market orders such as those challenged here.[7]

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[3]Id.

[4]*Report of Governor's Study Commission on Agriculture*, Minnesota, (1958) p. 173.

[5]*Milk Production, Disposition and Income*, *supra* note 2.

[6]*Fluid Milk and Cream Report*, United States Department of Agriculture, March, 1961.

[7]See, e.g., *Hood & Sons v. DuMond*, 336 U.S. 525; *Dean Milk Co. v. City of Madison*, 340 U.S. 349; *Regulations Affecting the Movement and Merchandising of Milk*, United States Department of Agriculture, Marketing Research Report No. 98 (1955) p. 50-58; *Classified Pricing of Milk*, United States Department of Agriculture, Technical Bulletin No. 1184 (1958) p. 32:

"• • • Compensatory payments are amounts of money

Barriers to market entry deny Minnesota milk producers a substantial market for fluid milk and compel the diversion of such milk into lower-valued manufacturing uses. Such barriers permit those within the protected area to ignore alternative sources of supply and extract a monopoly price from consumers. The excess production thereby induced is diverted into manufactured products and dumped onto the national market, thus depressing the value of milk produced in the midwest primarily for manufacturing purposes.[8]

Federal milk order restrictions such as those challenged

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which regulated handlers are required to pay into the pool for that portion of unregulated milk used in specified classes * * *. * * * * *

"Considerable controversy has centered around these devices as possible barriers to movement of milk to the markets where it would be most effectively utilized.

[8] *Report of Governor's Study Commission on Agriculture*, Willard W. Cochrane, Chairman*, *supra*, p. 185:

"But there are other important considerations with regard to the competitive position of Minnesota milk in Eastern and Southern markets. High Class I prices in some of the federal order and state controlled markets have undoubtedly underwritten an expansion in milk production in those areas. This is indicated by the fact that in many of these 'protected' markets an increasing proportion of milk is being utilized for manufactured dairy products; and certainly these markets have not experienced any contraction in their fluid milk requirements. For example, in 1947-48 about 39 percent of the milk received in the New York federal order market went into manufactured dairy products; in 1955-56 this had increased to about 53 percent. Similarly, the proportion of milk used for manufacture in the Boston market rose from 35 to 45 percent of the total supply; in the Philadelphia market it rose from 18 to 25 percent; and in the New Orleans market from 12 to 31 percent. The lowering of the Class I milk prices in these order markets would undoubtedly minimize this trend and permit Minnesota and Midwestern producers a larger share of the expanding future markets."

*Formerly Professor of Agricultural Economics at the University of Minnesota, Dr. Cochrane is now Economic Advisor to the Secretary of Agriculture.

here are cumulative in their effect on Minnesota's dairy industry. Similar restrictive provisions, if applied to the approximately 100 federal market orders affecting over two-thirds of the total volume of milk consumed in urban areas in this country, impede inter-area commerce and discriminate against major producing areas of the United States.[9]

## III. STATEMENT OF THE CASE

### A. Summary of Proceedings Below

This case arises under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. § 608c. Section 8c(15) (B) of that Act authorizes judicial review of the rulings of the Judicial Officer of the United States Department of Agriculture, who acts pursuant to authority delegated to him by the Secretary of Agriculture.[10]

[9]See, e.g., recent hearings on proposed federal order for Washington, D.C., Marketing Area wherein the Secretary, in recommending the establishment of a regulated market, stated at 23 Fed. Reg. 3721: "Because of the distances that eastern fluid markets are from areas of alternative supply in the Midwest, the price for milk for fluid uses in eastern markets is higher in relation to manufacturing milk values than is the case in the Midwest. Under such circumstances there might be an incentive for dealers in unregulated adjacent markets to seek a Class I outlet in the Washington market for temporary or seasonal surpluses in excess of their local market needs. Because of the substantial number of Government installations in the area which procure their milk supplies on a competitive bid basis for relatively short periods there is a considerable opportunity, unless appropriate safeguards are provided, for such unregulated dealers to market milk excess to their local needs at prices below the value of milk for fluid uses. They may do this by bidding off available contracts at such Government installations. This situation would be a serious disruptive factor to orderly marketing in the Washington marketing area. *It is essential, therefore, that the order be constructed in a manner which will safeguard the market from serving as a surplus disposal area for surrounding markets.*" (Emphasis added.)

[10]The Judicial Officer acts for the Secretary of Agriculture pursuant to delegated authority. 54 Stat. 81, 5 U.S.C. 516 et seq.

Petitioners instituted review proceedings before the Judicial Officer of the Secretary of Agriculture to challenge the validity of §§ 927.83 and 927.84 of Order No. 27 which require "handlers" to make "compensatory payments" on "nonproducer milk" distributed in the marketing area encompassed by the Order. (R. 9a, 26a). In accordance with the procedures of the Secretary, a hearing was held before a hearing examiner with respect to the issues raised by the petition and answer of the Department of Agriculture. (R. 42a.) On the authority of *Kass v. Brannan*, 196 F. 2d 791 (2nd Cir. 1952) certiorari denied 344 U.S. 891, the hearing examiner filed his report invalidating the challenged provisions with respect to both petitioners. (R. 56a, 59a.) Exceptions to the examiner's report were filed by the Secretary of Agriculture (R. 60a, 79a) and, following argument before the Secretary's Judicial Officer, the decision of the hearing examiner was reversed and the questioned provisions were ruled lawful. (R. 86a, 116a; R. 117a, 141a.)

Petitioners sought judicial review in the United States District Court for the Eastern District of Pennsylvania pursuant to § 8c(15) of the Act, and the separate proceedings were consolidated for trial. (R. 198a, 201a.) The district court, following *Kass v. Brannan*, reversed the Judicial Officer and invalidated the challenged provisions of Order No. 27, holding that they did not comply with § 8c(5) (A) and were unauthorized by the Act.[11] That

[11] *United States vs. Lehigh Valley Cooperative Farmers, Inc., et al*, 183 F. Supp. 80, 85: "Essentially [the challenged provisions] required nonpool plant handlers to make a *compensatory payment* to the Producer Settlement Fund for all of the fluid milk they distribute in the Order No. 27 area. These payments help to increase the uniform unit price paid to the regulated suppliers of Order No. 27—and they in no way benefit the farmers who in fact supplied the

section requires that the prices paid by handlers to producers for each class of milk "shall be uniform as to all handlers."

On appeal by the Secretary of Agriculture, the United States Court of Appeals for the Third Circuit reversed the decision of the district court, and rejected the *Kass* holding and reasoning.[12] The court below determined that "Section 8c(5) (A) has no application to non-pool hand-

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milk to these nonregulated handlers. The payments are designed to offset the otherwise harmful effect created by such sales. The compensatory payment in the case of fluid milk sales is based on the difference between the Class I (fluid milk) class price and the Class III (milk products) class price of Order No. 27. For every unit of liquid milk sold by plaintiffs or other partially regulated handlers, this difference must be paid into the fund." The court found: "The government cannot argue (nor has it attempted to argue) that the total cost to the plaintiffs of the liquid milk which they sell in northern New Jersey is equal to the cost to its competitors. There is uncontroverted evidence to prove that the cost of raw milk to the plaintiffs is substantially higher than the Order No. 27 uniform Class III price classification, so that the *total* cost to the plaintiff handlers (when we include the compensatory payment based upon the difference between the uniform Class I and Class III price) will be in excess of the cost to fully regulated pool plant handlers. This is exactly what Judge Swan said §608c(5)(A) of the Agricultural Marketing Agreement Act prohibited. *Kass v. Brannan, supra.*

[12]287 F. 2d 726, 729-730: "The Kass opinion assumes that the minimum class price provision of Section 8c(5)(A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. • • • This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

> "Section 8c(5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. • • •
>
> "Moreover to *imply* the thought urged by Lehigh and Suncrest as the motivation behind Section 8c(5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the *express* purpose set forth in the Act itself, i.e., regional regulation to secure a stable market and parity prices for producers. • • • "

lers"[13] and that the Act does not include "non-pool producers within the ambit of the term 'producers in Section 8c(5) (A) * * * "[14] It held that the challenged provisions of Order No. 27 were not inconsistent with § 8c(5) (A) of the Act and were authorized by § 8c(7) (D) as "incidental to * * * and necessary to effectuate the other provisions" of the Order.

## B. Structure and Operation of Federal Milk Order

### 1. *The Act*

The Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. 601 et seq.)[15] authorizes the Secretary of Agriculture to regulate the marketing of certain agricultural commodities, including milk. The declared policy of the Act is to establish and maintain such orderly marketing conditions for milk — and other agricultural commodities — as will establish parity prices for farmers. 7 U.S.C. § 602. In the event, however, that the prices[16] thus determined are not reasonable in view "of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the * * * order * * * relates," the Act directs the Secretary to fix such price as will "insure a sufficient quantity of pure and wholesome milk, and be in the public interest." 7 U.S.C. § 608c(18).

Section 8c of the Act prescribes the procedures, terms,

[13] 287 F. 2d at 731.

[14] 287 F. 2d at 731, footnote 6.

[15] The provisions of the Act appear as §§ 601-602, 608a(5)-608d, 610(a)-610(c), 610(f)-610(j), 612, 614, 671-674 of Title 7 of the United States Code.

[16] Sec. 2 of the Act (7 U.S.C. § 602) provides that "parity prices" are those defined by § 1301(a)(1) of Title 7 of the United States Code.

conditions and limitations relating to the issuance of a milk marketing order. Orders issued by the Secretary regulate persons "engaged in the handling" of milk, not its production, and are applicable to the particular marketing area defined in the order. § 8c (11) (A). "Such persons are referred to * * as 'handlers'." §§ 8c(1), 8c(13) (B).

A milk order is issued by the Secretary on the basis of findings made upon evidence introduced at a rule making proceeding. §§ 8c (3) (4). It may contain one or more of the terms specified in § 8c(5) and "no others," except certain terms common to all orders set out in § 8c(7). Section 8c(5) authorizes the Secretary to: (1) classify milk in accordance with the form in which or the purpose for which it is used; (2) fix minimum prices for each such use classification which all handlers must pay for milk purchased from producers or associations of producers; (3) provide for the payment to all producers delivering milk to the same handler of a "uniform" or average price for all milk delivered by them[17] (§ 8c(5) (B) (i), or a payment to all producers delivering milk to all handlers in the marketing area of a weighted average or "uniform" price for all milk so delivered, irrespective of the use made of such milk by the individual handler to whom it is delivered.[18] (§ 8c(5) (B) (ii).

In order to accomplish these purposes, the order may provide "a method of making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by

[17]Referred to as an "individual handler pool."
[18]Referred to as a "market-wide pool."

him at the prices fixed in accordance" with the pricing provisions of the Act. § 8c(5) (C).

Auxiliary terms [i]ncidental to, * * * not inconsistent with the terms and conditions specified" in § 8c(5) "and necessary to effectuate the other provisions of [the order]" are authorized by § 8c(7) (D).

After the Secretary has determined that the adoption of an order with respect to a marketing area will effectuate the declared policy of the Act, it must be approved in a referendum by two-thirds of the producers who, during a representative period determined by the Secretary, have been engaged in the production of milk for sale in the marketing area specified in the order. § 8c(9) (B).[19]

Section 8c(7) (C) authorizes the Secretary to designate an agency to administer an order; to make rules and regulations to effectuate its terms; to receive, investigate and report complaints of violations; and to recommend to the Secretary amendments to the order. The cost of administration is defrayed by assessments collected from handlers regulated by the order. § 10(b) (2) (ii).

Section 8c(15) (A) permits a handler subject to an order to challenge the lawfulness of any of its provisions by filing a written petition with the Secretary of Agriculture asserting the grounds of invalidity. The handler must be accorded a hearing before the Secretary's judicial officer whose rulings are "final, if in accordance with law." *Ibid.* Judicial review of his decisions in the district courts of the United States is authorized by § 8c(15) (B) of the Act.

[19]See "Procedure for the Conduct of Referenda," 15 F.R. 5177. With respect to milk, marketing orders do not specify "production areas"; hence the alternative provisions in §§ 8c(9) (B) (i) and (ii) are inapplicable.

## 2. *Market Wide Pool—Purpose, Operation and Effect.*

### (a) Rationale of Market Wide Pooling.

The milk marketing order provisions of the Act involve a commitment to the classified pricing system worked out over the years by the milk cooperatives. Pricing according to use was developed as a means of smoothing out the violent price fluctuations occasioned by the presence of milk supplies surplus to the fluid needs of the market.

The milk supply for a metropolitan area was often limited to those farms within the zone of inspection of the health authority having jurisdiction in the marketing area.[20] Milk production per cow in the spring months of the year may reach a level two to two-and-one-half times the production during the fall and winter. The demand, however, is relatively constant. In order to assure an adequate supply during peak periods of consumption and low production there will necessarily be a surplus during the spring and early summer.[21]

In addition, day-to-day requirements for fluid purposes cannot be precisely measured making it necessary to have

[20]The power of states or local municipalities to exclude milk inspected by other jurisdictions was accepted as a permissible exercise of police power at the time of the adoption of the Act. Hence, little or no attempt was made to supply market requirements during periods of low production from distant production areas. Instead, production from local or nearby sources was geared to supply the market needs during peak periods of highest consumption and lowest seasonal production. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349, the Court held that a city may not regulate its milk supply in such a manner as to discriminate against milk produced in another jurisdiction where non-discriminatory alternatives are available to assure itself of the safety of that supply.

[21]See *Nebbia v. New York*, 291 U.S. 502; *United States v. Rock Coop., Inc.*, 307 U.S. 533, 549.

available to the market an "operating surplus." This necessary "seasonal" and "operating" surplus, competing for the higher-valued fluid milk outlets resulted, oftentimes, in the complete demoralization of the price structure.

To avoid this destructive competition arising from the presence of necessary surplus, the cooperatives, had devised a system of classified pricing which they incorporated into contracts with dealers by the terms of which the dealers agreed to accept all supplies offered by the producer at predetermined prices depending upon the purpose for which the milk was used. *Nebbia v. New York, supra.* However, since the arrangements were voluntary, they often broken down when supplies became burdensome. State milk control laws[22] and the Agricultural Marketing Agreement Act of 1937 supplied government compulsion to what had previously been voluntary price arrangements.

**(b) Operation of a Market Wide Pool Under a Federal Order.**

Under a milk order handlers (or dealers) pay for milk according to the use for which the handler disposes of it; i.e., according to "use classification." Milk sold for fluid use (Class I milk) has the highest value; the surplus that cannot be sold in fluid form must be processed into manufactured products (Class III in Order No. 27) and has the lowest use value. The price for each class is fixed by the order. The producers supplying the handler, however, are paid neither the Class I nor the Class III price but rather a "blend" or "uniform" price based upon market-wide pooling of all handlers' receipts and sales in accordance with the provisions of § 8c(5) (B) (ii). The "blend"

[22]See, e.g., New York Laws, 1937, c. 383.

price is a weighted average price derived by multiplying the total amount of milk disposed of in the market area by all handlers in all classes by the established price for each class. The product of that multiplication, divided by the total quantity of milk sold in the market, yields the "blend" or "uniform" price paid to producers located at fixed distances from the market center. Location differentials above or below the "minimum blend price" allow for the cost of transportation to the market. § 8c(5) (A) (ii) (c). "The purpose of the [location] differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers."[23]

Since § 8c(5) (A) of the Act requires uniformity of class price among handlers, some handlers will pay into or receive from a "Producer Settlement Fund" the amount by which their purchased milk, multiplied by the minimum prices for each class, is greater or less than their purchased milk multiplied by the uniform price.

### 3. Order No. 27.

Order No. 27 was adopted in 1938 shortly after the passage of the Act and regulated the marketing of milk in the New York city metropolitan area. The Act and the Order were considered by this Court and sustained in *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, and have been the subject of other litigation since that time.[24] Order No. 27 originally defined the marketing

[23] *Regulations Affecting the Movement and Merchandising of Milk, supra*, p. 61. The price received by producers varies inversely with their distance from the market center, subject to certain limitations.

[24] *United States v. Adler's Creamery, Inc.*, 110 F. 2d 482 (2d Cir. 1940); *New York State Guernsey Breeders' Coop., Inc., v. Wickard*, 141 F. 2d 805 (2d Cir. 1944); *Grandview Dairy, Inc., v. Jones*, 157

area as "the City of New York and the Counties of Nassau, Suffolk and Westchester." *United States v. Rock Royal Coop., Inc., supra* at 554. As originally adopted, a "producer" under the Order was "any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area", *ibid.*, while a "handler" was "a person engaged in the handling of milk or cream received at an approved plant for similar sale." *Ibid.*

Handlers were regulated with respect to milk entering the marketing area. The Order required them to pay the "uniform pool" or "blended" price calculated by the marketing administrator to all producers delivering milk during any month unless the handler had sold it as Class I milk outside of the marketing area.[25] "In such instance, the handler [was] required to pay the uniform price to each producer on that part of the milk received which [was] equal to the proportion of milk to which minimum prices [were] applicable. For the remainder of each producer's milk, the handler [paid] such prices as he [saw] fit but [was] required to furnish the producer with a statement of the percentage of the producer's milk paid for at the uniform price."[26]

Under Order No. 27 as originally adopted, handlers were permitted to blend prices paid for milk sold in other

F. 2d 5 (2d Cir. 1946); *Dairymen's League Coop. Ass'n v. Brannan*, 173 F. 2d 57 (2d Cir. 1949); *Titusville Dairy Products Co. v. Brannan*, 176 F. 2d 332 (3d Cir. 1949); *Kass v. Brannan*, 196 F. 2d 791 (2d Cir. 1952); *Grant et al v. Benson et al*, 229 F. 2d 765 (App. D.C. 1955).

[25]See *United States v. Rock Royal Coop., Inc., supra* at 565: "The Order • • • limits minimum prices to milk 'sold in the marketing area or which passes through a plant in the marketing area.' Other milk, though from the same production area, is 'unpriced milk' and does not figure in the computation of the uniform price."

[26]*United States v. Rock Royal Coop, Inc.*, Record, p. 96.

markets, with the uniform price announced by the administrator for milk sold in the regulated marketing area. 307 U.S. at 566. Since the purpose of the Act and the Order is "to establish and maintain * * * orderly marketing conditions"[27] and to insure a sufficient quantity of pure and wholesome milk "*in the marketing area to which the contemplated * * * order * * * relates,*"[28] (emphasis supplied) the administrator was not concerned with that portion of a regulated handler's total milk receipts sold outside of the regulated marketing area.[29]

In 1945 Order No. 27 was amended to create a class of persons termed "dairy farmers who are not producers."[30] The section required payments to be made to "producers" through the "Producer Settlement Fund" by "handlers" who received milk from "dairy farmers who are not producers." The charge, termed a "compensatory payment," was paid to "producers" upon each cwt. of milk received from non-producer dairy farmers and was measured by the difference in price between the Class I, or highest valued use, and the lowest valued use. The charge upon milk of "farmers who are not producers" was voted into effect by a referendum under §§ 8c(9) and (19) of the Act, which

[27] 7 U.S.C. § 602(1) (4).

[28] 7 U.S.C. § 608c(18).

[29] *United States v. Rock Royal Coop., Inc., supra* at 566-7: "It is erroneous to suppose that by buying some milk at less than the minimum, the 'actual price' paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum but for the part sold in the marketing area or passing through plants there located the minimum is paid."

[30] Sec. 927.8(e) of Order Regulating the Handling of Milk in the New York Metropolitan Milk Marketing Area, adopted August 1, 1945.

referendum was limited only to "producers" in accordance with the voting regulations of the Secretary.[31] Accordingly, voting was limited to "producers" who were the intended beneficiaries of the proposed amendment. Dairy farmers who could not qualify as producers though engaged in the production of milk for sale in the marketing area were excluded from voting.[32]

The "compensatory payment" provisions of Order No. 27 were challenged in *Kass v. Brannan*, 197 F. 2d 791 (2d Cir. 1952). The plaintiff in that case, a "pool handler" regulated under Order No. 27, had bought non-pool cream and condensed milk from an Ohio plant for sale to ice cream manufacturers in the marketing area. He was assessed payments by the administrator amounting appproximately to 21 cents per quart of cream and 80 cents per cwt. of milk for all such non-pool cream and condensed milk purchased during the period involved in that case. In an administrative proceeding under § 8c(15) (A) of the Act challenging the compensatory payment provisions, the hearing examiner held that the charges were invalid because violative of § 8c(5) (G) of the Act.[33] The Sec-

[31]See "Procedure for the Conduct of Referenda," 15 F.R. 5177: "Each producer, *as defined in the Order or amendment with respect to which the referendum is to be conducted*, who, during the representative period determined by the Secretary, was engaged in the production of milk for sale in the marketing area, shall be entitled to one vote in any such referendum • • • " (Emphasis added)

[32]Sec. 927.8(e) and (f) of Order No. 27 as amended in 1945 limited the term "producers" to dairy farmers who delivered milk to a "pool plant." A plant could become a "pool plant" only if it was located in one of the six states of the so-called New York Milk Shed — i.e., New York, Massachusetts, Connecticut, Pennsylvania, New Jersey, Vermont, § 927.3(a) (2) (i), and if it shipped fluid (Class I-A) milk into the New York marketing area under prescribed conditions.

[33]"No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner

retary's Judicial Officer refused to adopt the findings, report and decision of the hearing examiner and ruled that the compensatory payments provision of Order No. 27 was authorized by the "incidental" power of the Secretary under § 8c(7) (D) of the Act. While the Secretary in his findings accompanying the adoption of § 927.8(e) found that the levy was necessary to prevent "inequality in the cost of milk" as between handlers buying milk "from other than producer sources" and those buying from "producers," "with accompanying loss of market for producers' milk" the Judicial Officer held the provision lawful on the grounds that, unless payments were imposed on "outside cream," it would be able to displace cream from pooled milk (8 Ag. Dec. 1083), and that the payment is a "compensatory" one, for "the benefit of the pool milk producers" to compensate the latter when their milk is displaced by the milk of "dairy farmers who are not producers." (8 Ag. Dec. 1083).

The district court adopted the ruling of the judicial officer. However, on appeal, the Courts of Appeals for the 2d Circuit termed the challenged provisions "penalty payments" and held that the sections of Order No. 27 authorizing them violated § 8c(5) (A) of the Act.

After the decision in the *Kass* case, new hearings were held on Order No. 27 and a new compensatory payment provision was adopted on the basis of evidence submitted at that hearing.[34] Essentially the same compensatory pay-

limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

[34]The Secretary interpreted *Kass* as holding that the compensatory payments there involved were not justified by the evidence.

ment provisions invalidated by *Kass* were incorporated in amended Order No. 27 based on findings by the Secretary that the value of non-pool milk to a regulated handler is the Class IV or surplus price and that elimination of the provision would give an unfair advantage to non-pool handlers in competition for producer supplies. (R. 756a.)

On May 25, 1956, a Notice of Hearing was published in the Federal Register (21 F.R. 3537-3539, R. 44a) to consider the establishment of a separate milk order for New Jersey or the extension of Order No. 27 to include a portion of northern New Jersey. After extensive hearings (R. 46a-47a), findings based upon the evidence received at these promulgation hearings were made tending to show that northern New Jersey is a part of the New York metropolitan milk marketing area (R. 47a) and that unregulated handlers (including these petitioners) market milk in that area in competition with handlers regulated under Order No. 27 It was also found by the Secretary that milk may be bought for fluid use by unregulated handlers for sale in northern New Jersey at slightly above the Order No. 27 uniform price. (R. 49a.)

In a recommended decision and order based upon the foregoing proceedings (22 F.R. 3318-3357, R. 49a), the Secretary proposed that the handling of milk in northern New Jersey should be brought under regulation by amending Order No. 27 to include that area. (R. 49a.) The recommended order also included provisions (§§ 927.83, 927.84) for compensatory payments into the Producer Settlement Fund under certain conditions, amounting to the difference between the Class I-A, or fluid milk price, and Class III, or surplus price, to be paid by outside handlers who dispose of "non-pool" or "non-producer" milk within the marketing area. (R. 49a.)

A final decision and order, in substantially the same form as the recommended order, was published in the Federal Register for July 2, 1957, to become effective on August 1, 1957, (22 F.R. 4643-4659, R. 50a) extending Order No. 27 to northern New Jersey. As a result of that order, petitioners who theretofore were unregulated by Order No. 27 were brought under its regulatory provisions with respect to milk distributed in that part of New Jersey included in the Order No. 27 marketing area. By virtue of §§ 927.83 and 927.84 and complementary provisions, petitioners were ordered to make payments into the Producer Settlement Fund on all milk distributed in that area.

The provisions of Order No. 27 relevant to the issues in this case are as follows:

7 C.F.R. § 927.5 — Dairy Farmer. "Dairy farmer" means any person who produces milk.

§ 927.6 — Producer. "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant.

§ 927.7 — Handler. "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

§ 927.75 — Producer settlement fund. The market administrator shall establish and maintain a separate fund known as "the producer settlement fund" into which he shall deposit all payments and out of which he shall make all payments pursuant to §§ 927.77 through 927.84.

§ 927.83 — Payments on milk received from dairy farmers at nonpool plants. Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(a) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(1) It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in § 927.65(h) (2) or (3) was received from the handler's own farm.

(2) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(3) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(b) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(1) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this part: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to § 927.44 adjusted for the location of the plant.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the non-pool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and

cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to § 927.44 as similarly adjusted for location. * * *

(c) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph: * * *

(d) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to § 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with § 927.80.

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Petitioner Lehigh Valley Cooperative Farmers, Inc., is a farmers cooperative composed of milk producers, some of whom ship milk to the Lehigh Valley plant in Allentown, Pennsylvania. (R. 88a.) From this plant the cooperative distributes milk in the surrounding area in Pennsylvania and in a portion of New Jersey included within Order No. 27. This New Jersey market has been

served by the petitioner for approximately twenty years, its sales therein representing about 8 per cent of its total bottled milk business. (R. 303a) Petitioner Lehigh Valley is also a regulated handler under Order No. 61, a federal order regulating the marketing of milk in the Philadelphia, Pennsylvania, milk marketing area. By virtue of that order and the regulatory provisions of the Pennsylvania Milk Control Commission, prices paid by Lehigh Valley to its producers were fully regulated prior to the extension of Order No. 27 to the New Jersey area. (R. 88a.)

Petitioner Suncrest Farms, Inc., is a proprietary corporation located in Bethlehem, Pennsylvania. It receives milk from farmers and processes, bottles and distributes it in the surrounding area of Pennsylvania and in a part of New Jersey regulated by the extension of Order No. 27. Approximately 4 per cent of its total bottled milk sales are in the New Jersey area.

Petitioners are "handlers" (§ 927.7) distributing in a part of the Order No. 27 marketing area the "non-pool milk" (§§ 927.25, 927.29) of dairy farmers who are not "producers." (§§927.5, 927.6.) By virtue of §§ 927.83 and 927.84, petitioners were billed compensatory payments by the administrator to be paid into the Producer Settlement Fund for distribution to Order No. 27 producers upon all "non-pool milk" distributed by them in the areas subject to regulation under Order No. 27.

## SUMMARY OF ARGUMENT

The purpose and policy of the Agricultural Marketing Agreement Act of 1937 is to alleviate chaotic marketing conditions by promoting and encouraging interstate commerce in the products regulated by the Act. The Act authorizes the Secretary to fix prices to be paid by handlers

to producers with respect to milk sold in a regulated area. Section 8c(5)(G), by its terms, legislative history and judicial construction, is intended to prohibit the Secretary from placing barriers in the way of the interstate flow of milk and milk products. Section 8c(5)(D) is the sole authority for restricting access of new producers to the market.

The Act narrowly circumscribes the terms and conditions that may be included in a milk order. Nowhere does the Act permit the Secretary to exclude qualified dairy farmers from the benefits of the Act. The Secretary's definition of the term "producer" is designed solely to divide and allocate markets among dairy farmers rather than to protect the price structure in the market. The purpose and effect of the challenged provisions is to insulate the regulated marketing area against the competition of milk and dairy products produced in other production areas of the United States. The provisions are designed avowedly to give market preference to regional producers and to discriminate against other production areas.

The challenged provisions burden and obstruct the channels of interstate trade and conflict with basic antitrust policy. The Act grants antitrust immunity only to price fixing arrangements adopted in accordance with its terms and conditions. The Secretary, through the exercise of an authority to adopt terms and conditions "incidental" to the main purposes of the act, had unlawfully assumed the power to foreclose competitors from substantial markets.

## ARGUMENT

### I

### THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 UNLAWFULLY DISCRIMINATE AGAINST QUALIFIED PRODUCERS BY EXCLUDING THEM FROM THE MARKETING AREA

The question in this case is whether certain provisions of the New York-New Jersey milk marketing order, 7 C.F.R. § 927.1 et seq. are within the statutory authority granted to the Secretary of Agriculture by the Act. The case raises a question of the statutory power of the Secretary of Agriculture to separate dairy farmers serving a market into "producers" and "dairy farmers who are not producers," limiting or restricting the latter from entry into the market regulated by the Order.

Warrant for the Secretary's orders must be found in the Act. Economic necessity is no substitute for lack of statutory authority. As in *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282, 289, here, too, "it is argued that the present regulation is needed" to maintain the integrity of the marketing plan. But as this Court said in that case: "If the Act does not fit the present economics of the business, a problem is presented for the Congress."

The court below found the challenged provisions authorized as "incidental to * * * and necessary to effectuate the other provisions * * *" of the Order under § 8c (7) (D) of the Act. 287 F. 2d at p. 732. It is on that source of power alone that the Secretary relies here. (See Mem. For Resp., pp. 17, 23-24.)

## A. The Act Does Not Authorize Market Preference For Regional Producers.

The court below stated that the "*express* purpose" of the Act is "regional regulation to secure a stable market and parity prices for producers." 287 F. 2d at 730. In holding that the Act empowers the Secretary to compel "outside" producers entering a market to compensate the market's "primary producers" for loss of sales,[35] the court accepts market exclusion as a permissible device to accomplish the Act's objectives.

The holding is grounded on the erroneous premise that the § 8c (11) (C)[36] requirement that the Secretary consider regional differences in framing marketing orders a norizes preferred treatment for regional producers and market exclusion of "non-producer" dairy farmers from the regulated marketing area. Having assumed that the "ultimate goal of the Act" is to stabilize a market for regional producers (287 F. 2d at p. 732), the court moved easily to the conclusion that the "establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers" (287 F. 2d at p. 731) and exclusion of non-pool producers from "within the ambit of the term 'producers' in Section 8c (5) (A) • • • ". 287 F. 2d at p. 731, fn. 6. The Act's objectives of orderly and stable marketing conditions are to be achieved, according to the court below, by restrictions on

[35]See (R. 754a.)

[36]7 U.S.C. §608c(11)(C) provides: "All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas."

market entry rather than by compelling adherence by all handlers to the market's uniform price structure.

### 1. *The Act Does Not Authorize a Division of Dairy Farmers into "Producers" and "Non-Producers," Excluding the Latter From Its Benefits.*

Section 927.5 of Order No. 27 defines a "dairy farmer" as "any person who produces milk." Section 927.6 defines a "producer" as "any dairy farmer whose milk is delivered direct from farm to a pool plant." A "pool plant" is any plant so designated prior to the July 1, 1957, amendments extending Order No. 27 to the New Jersey area (§ 927.25) or any plant located in New York, New Jersey or Pennsylvania (§ 927.25 (b) ) having health department approval for the distribution of milk in the marketing area and disposing of the major share of its receipts from dairy farmers in fluid form in the marketing area (§§ 927.25 (d), 927.27 (g), 927.29).[37] Only a "producer" may freely market his milk in the area regulated by Order No. 27. A "dairy farmer" delivering milk to a plant having some sales in the Order area but which is not located in New York, New Jersey or Pennsylvania (§ 927.25 (b) ) or which, though located in those states, has its major distribution of milk in other markets (§ 927.29) is excluded thereby from the pricing and pooling provisions of the

[37] "Prior to the August 1, 1957 amendment to Order No. 27, those handlers who sold less than one-half of their total milk sales in the Order No. 27 area could not have their plants recognized as pool plants * * *." Opinion, district court (R. 214a-215a). Subsequent to the commencement of review proceeding in the district court, Order No. 27 was amended "so as to make handlers, such as plaintiffs, who sold milk in the Order No. 27 area fully regulated handlers unless they *elected* to be nonfully regulated handlers subject to the compensatory payment provisions of the Order * * *." (R. 228a.)

Order. The "non-pool handler" distributing the milk of a "dairy farmer" in the Order No. 27 area is required by §§ 927.83 and 927.84 of the Order to pay a charge of approximately 5½ cents per quart on all such milk for distribution among the market's "regular" producers "to compensate the pool for the loss of the Class I fluid milk utilization and[to] protect the uniform blend price in the marketing area." 287 F. 2d at p. 730. Non-pool handlers must pay this charge even though they have paid their "dairy farmers" the market order's minimum prices.[38]

Justification for differentiation and exclusion of "dairy farmers" and "non-pool handlers" is claimed to be found in § 8c (11) (A) of the Act. According to the government, that section "expressly directs that marketing orders be limited in application to *regional* production or marketing areas. The authorization of regional orders requires, in turn, that a line be drawn between those producers and handlers subject to the pooling provisions of a particular order and those who are not, and it is that function that is served by the Secretary's definitions of 'producers' and 'pool plants' under Order No. 27." (Mem. For Resp., p. 22.)

But a careful examination of the Act shows, clearly, that nothing in § 8c (11) expressly or impliedly authorizes the Secretary of Agriculture to regulate or limit either the production areas or the producers who may sell their milk in a regulated marketing area. Section 8c (11) (A) provides:

[38] "• • • the uncontroverted facts in this case are that [petitioners] can NOT purchase raw milk from its producers at [the Class III] price • • •. Thus its *actual cost* plus the compensatory payment is substantially higher than the cost to fully regulated Order No. 27 handlers." Opinion, Clary, J., District Court, fn. 9 (R. 224a.)

> "No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of [the Act]."

Section 8c (11) (B) provides that:

> "*Except in the case of milk and its products*, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy." (Emphasis supplied.)

With respect to milk orders, the reference to production areas is inapplicable. Orders regulate the "handling," not the production of milk. § 8c(1). Section 8c (13) (B) states that:

> "No order issued under [the Act] shall be applicable to any producer in his capacity as a producer."

The Secretary is directed by § 8c (11) (A) to establish regional "marketing areas" and by § 8c (11) (C) to "give due recognition to the differences in those marketing areas. Nothing in those sections permits him to circumscribe production areas or limit the meaning of the term "producers" or their entry into the market.

### 2. *The Order No. 27 Definition of "Producer" Is Contrary to the Act.*

The term "producer" appears throughout the Act but nowhere does the Act speak of "dairy farmers who are not producers." Sec. 8c (5) (A) of the Act authorizes the

fixing of minimum prices by handlers "for milk purchased from producers." Nowhere, however, does the section permit the Secretary to transfer to certain "regular producers" a part of the price paid by handlers to "dairy farmers who are not producers" as condition of entry into the regulated market.

Section 8c(5)(B) authorizes the "payment to all producers * * * of uniform prices for all milk delivered by them"; and § 8c(5)(C) authorizes the accomplishment of such uniformity by "providing a method for making adjustments in payments as among handlers." Sec. 8c(9)(B)(i) of the Act provides that an order may be issued if approved or favored: "by at least two-thirds of the producers * * * who, during a representative period determined by the Secretary, * * * have been engaged in the production of [milk] for sale in the marketing area specified in such marketing * * * order.[39]

It is uncontroverted that the dairy farmers supplying these petitioners have been continuously engaged in the production of milk for sale in the marketing area specified in Order No. 27 for periods of up to twenty years. Nonetheless, they have been "defined" out of the category "producers" and excluded from the market by the Secretary's determination that they are not the market's "regular" or "primary' suppliers. The plain words of § 8c(9)(B)(i) of the Act require the Secretary to include in the term "producer" any person who, during a selected month, prior to the adoption of the Order produced milk approved for sale and, in fact, sold in the regulated area.

A similar attempt to limit by regulation a clear and

[39]See "Procedure for Conduct of Referenda," supra note 19. The alternative provisions of §§ 8c(9)(B) (i) and (ii) are inapplicable.

unambiguous statutory definition was held invalid in *Addison v. Holly Hill Co.*, 322 U.S. 607. That case was an action by employes for wage payments under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* Section 13 (a)(10) of the act exempted from its coverage persons "within the area of production (as defined by the Administrator), engaged in * * * canning of agricultural * * * commodities for market * * *." The Administrator, by regulation, directed that the exemption should include individuals engaged in canning "if the argicultural or horticultural commodities are obtained by the establishment where he is employed from farms in the immediate locality and the number of employes in such establishment does not exceed seven." 322 U.S. at p. 609. This Court noted that Congress had placed a broad discretion in the Administrator to weigh and synthesize all factor relevant to the limitation of an "area of production," but nonethless held the regulation invalid, stating (322 U.S. at p. 614):

> "* * * if Congress intended to allow the Administrator to discriminate between smaller and bigger establishments within the zone of agricultural production, Congress wholly failed to express its purpose. Where Congress wanted to make exemption depend on size, as it did in two or three instances not here relevant, it did so by appropriate language. *Congress referred to quantity when it desired to legislate on the basis of quantity.*" (Emphasis supplied.)

Commenting further on the administrator's action, this Court observed (322 U.S. at p. 617):

> "* * * it is no warrant for extending a statute that experience may disclose that it should have been made more comprehensive. 'The natural meaning of words cannot be displaced by reference to difficulties in administration.' * * *"

The meaning of the term "producers" under § 8c of the Act was considered in *H. P. Hood & Sons v. United States*, 307 U.S. 588. In that case appellants claimed that the Secretary had unlawfully excluded certain producers from voting in a referendum to determine producer approval of the proposed order. He had limited voting "to producers who had delivered milk to a station approved for the shipment of milk to the marketing area and which had shipped milk or cream to the marketing area during the representative period" (307 U.S. at p. 597). This court noted (307 U.S. at p. 598):

> "The Secretary 'may conduct a referendum among producers.' What producers? Those 'engaged in the production of [milk] for sale in the marketing area * * *.' Every producer who voted was so engaged. Each delivered milk to the plant of a handler licensed to distribute and sell fluid milk in the marketing area. *The Order is aimed at the handling of milk marketed in the area.* * * *" (Emphasis supplied.)[40]
>
> "* * *
>
> "* * * Nor can it make any difference that less than 50 percent of the milk of some stations was shipped to the marketing area during the representative period. There is nothing in the Act that compels adopting 50 percent as determinative. It was enough that the handlers of these producers did send some part, and could have sent all."

[40] The court below and the government here erroneously assume that a dairy farmer who comes "within the ambit of th term 'producer' in § 8c(5)(A)" must necessarily subject *all* of his production to full regulation. (See, 287 F. 2d at 731, fn. 6.) The Act, however, intends the regulation of handlers with respect only to milk disposed of in the regulated area. See, *Hood* case, *supra*, and *United States v. Rock Royal Coop., Inc.*, 307 U.S. 533, 558:

> "* * * the uniform price[s] [paid by dealers to producers] are not applicable to milk sold outside the marketing area * * *."

The Secretary, in that case, "* * * considered as producers those persons who, during a representative period (May, 1937), delivered milk to a station, which station, in that month, shipped some part of its products to the marketing area as milk or cream and was approved by one or more of the health authorities in the marketing area."[41]

The court's holding in *Hood* means simply that a dairy farmer is a "producer"—*with respect to the share of his milk that enters the regulated marketing area*—within the meaning of the Act and the order so long as he ships to a handler who distributes milk in the regulated area.

The term "producer" had the same meaning in Order No. 27 as originally adopted in 1938. See *United States v. Rock Royal Coop., Inc.* 307 U.S. 533. There, "producer milk" was all milk approved for sale by the health authority having jurisdiction in the marketing area. "Partial regulation" meant only that all milk sold in the marketing area had to be paid for by the handlers at the "uniform price." A "producer" under the Order was "any person producing milk delivered to a handler at a plant approved by a health authority for the receiving of milk for sale in the marketing area." 307 U.S. at p. 554. The Order required that the minimum price be paid only for milk:

> " 'sold in the marketing area or which passes through a plant in the marketing area.' Other milk, though from the same production area, [was] 'unpriced milk' and [did] not figure in the computation of the uniform price. Where both priced and unpriced milk [was] dealt in by a handler he [furnished] a statement to

[41]See Record, Vol. II, 202, *Brief for Respondent Secretary of Agriculture*, p. 115, *Whiting Milk Company v. United States of America and Henry A. Wallace, Secretary of Agriculture*, No. 809, October term, 1938.

the producer showing the percentage of his milk paid for at the uniform price." (307 U.S. at p. 656)

Nothing in the Act permits the Secretary to divide plants and producers into groups geographically or according to whether they elect to become regularly associated with the market, excluding from the market all who fail to meet the volume requirements imposed. The government's arguments aimed at demonstrating the need for compensatory payments, based upon definitions of "pool" versus "non-pool" plants, "producers" versus "non-producer" milk, and "regulated" versus "non-regulated" or "partially regulated" handlers fail to disclose that *all of these terms are defined by the administrator, not the Act,* on the basis of certain presuppositions that petitioners here assert are without statutory support. The Secretary, having established a market structure on the basis of his own definitions, now insists that the challenged regulations are necessary to its proper functioning.

## B. The Compensatory Payment Provisions Unlawfully Limit or Prohibit the Entry of Qualified Producers Into the Market Contrary to §§8c(5)(D) and 8c(5)(G) of the Act.

The Judicial Officer and the court below held that the compensatory payment provisions of Order No. 27 are valid measures appropriately designed to protect "producers" against displacement of Class I sales by unregulated outside milk. The Judicial Officer said: "It is the milk subject to classification, pricing and pooling under Order No. 27, that is, milk received at pool plants, with respect to which the declared policy of the act is operative under the order" (R. 134a.). The district court invalidated

the compensatory payment provisions of Order No. 27 on the authority of *Kass v. Brannan*, 196 F. 2d 791 (2d Cir. 1952) certiorari denied 344 U.S. 891.

In *Kass* the court held that the provisions of Order No. 27, imposing "compensatory payments" on a dealer with respect to "outside milk" distributed in the New York area, were not authorized by the Act. The court found that the "penalty," when added to the handler's actual cost, resulted in a "price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area." 196 F. 2d at p. 796. Such lack of uniformity, the court found, contravenes § 8c(5) (A) of the Act. In *Lehigh*, on the other hand, the court below deemed protection of the producers' market on a regional level the essential purpose of the Act.

The two decisions adopt inconsistent and irreconcilable views of the purposes of § 8c of the Act. Adopting the reasoning of the court below, only those producers primarily associated with the regulated market would be permitted to supply it, since the compensatory payment is measured to result in total exclusion. The *Kass* decision, on the other hand, would exclude "outside producers'" milk from the regulated market only to the extent that its entry would give a handler in the market a competitive price advantage and break down the pricing structure established by the Order.

### 1. *In Adopting the Act, Congress Considered and Rejected Measures That Would Have Limited Market Entry.*

The language of § 8c and its legislative history support the holding of *Kass* and opposes the decision of the court below. Section 8c(5) of the Act expressly limits the provisions of a marketing order to the terms and conditions in §§ 8c(5) and 8c(7) and "no others." Section 8c(5)(G) provides:

> "No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States."

The problem of competition in the sale of milk and milk products from other markets or from "new producers or new producing areas" was before the Congress when it considered the adoption of the Act. Under § 8 (3) of the Agricultural Adjustment Act of 1933,[41] the Secretary was authorized to issue licenses regulating processors and producers engaged inthe handling of any agricultural commodity. Explaining the dairy program under that Act, Dr. Clyde L. King, the first head of the Dairy Branch of the United States Department of Agriculture, said in 1933:

> "A second essential, it seems to me is that in these whole milksheds there must be territorial limitations. If the cities and the states are to place health requirements as to sanitary conditions under which milk is to be produced, it is only fair that there be adequate territorial limitation so that the farmers who have

[41] 48 Stat. 31, repealed by § 5 of this Act.

those added costs may benefit from the possibility of reasonably higher prices to compensate these costs. "* * *

"Not only must be have some territorial limits but it must be clear, as these trade agreements are set up, that all buyers must buy in that territory on the price and under the plan. * * *"[42]

Such an approach to the problem was natural in 1933. Local jurisdiction over milk supplies was accepted as the rule and market patterns were developed accordingly.[43] But debates in Congress on the 1935 amendments reflected the strong opposition to Dr. King's policy that "buyers must buy in that territory on the price and under the plain." Alert to the competitive nature of the milk industry, Congress, in the debates preceding the adoption of the Act, considered carefully measures to protect "regulated" milk against destructive competition. In the House committee which considered the bill, Representative August Andresen, of Minnesota asked:

"Is there anything in the milk section of the bill which gives the Secretary authority to set up trade barriers and stop the free flow in commerce throughout the United States of dairy products?"

He was answered by Representative Jones of Texas:

"No. There is nothing in that bill that would authorize that. The Secretary may require that in crossing from one region to another that they comply with the same conditions which the farmers and distributors comply within that region * * * but he cannot set up any trade barriers which would keep them out. * * *"[44]

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[42]Black, *The Dairy Industry and The A.A.A.* (1935) p. 472.
[43]But see, *Dean Milk Co. v. City of Madison*, 340 U.S. 349.
[44]79th Cong. Rec. 9462 (1935).

Representative Andresen's concern was not allayed, however. He offered the following amendment:

> "(g) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area of the United States."[45]

Representative Sauthoff of Wisconsin suggested that the words "limit or tend to limit" be substituted for "prohibit," to assure that the regulatory scheme could not be used as a device to exclude Wisconsin milk and cream by indirect means. Representative Jones, of the House Committee on Agriculture objected that this would wreck the whole milk program. He agreed, however to adopt the word "prohibit" because:

> "That simply treats all areas alike, for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area."[46]

In Conference Committee the Andresen amendment was changed to the form in which it now appear in § 8c (5) (G) of the Act. The Final Conference Report No. 1757, 74 Cong., First Sess. at p. 21 explains why the conference committee adopted the words "limit, in the case of products of milk":

> "*Amendment No. 24*: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could prohibit the marketing in that area of any milk or products thereof produced *in any production area* in the United States. The Senate amendment extended this provision so that no marketing agreement or order so ap-

[45] 79th Cong. Rec. 9572 (1935).
[46] Id.

plicable could limit in any manner the marketing in the marketing area of milk or its products *produced anywhere* except that certain limitations on the marketing of milk were specifically permitted. The conference agreement retains the House provision with respect to prohibitions on marketing of both milk and products of milk. The conference agreement also *denies the authority to limit* in any manner the marketing in any area of *milk products* (butter, cheese, *cream, etc.*) *produced anywhere* in the United States. The language adopted by the conference agreement does not refer to milk, and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on *price* fixing, price adjustment, payments for milk, etc." (Italics ours.)

In view of the administrative purpose of §§ 927.83 and 927.84 to prevent competition between the price of pooled milk and nonpooled milk, whatever its cost, it is clear that the "compensatory charge" imposed on the latter prohibits the marketing of such products contrary to § 8c(5)(G). Indeed, this is the avowed purpose of the debated provisions. Clearly, nothing can limit market entry more effectively than a charge in the nature of a protective tariff. What else is a charge "to compensate [pool producers] for the loss of Class I fluid milk utilization and * * * protect the uniform blend price [of producers] in the marketing area"[47] if it is not a device to limit or prohibit market entry within the meaning of § 8c(5)(G)?

The Judicial Officer and the court below barely discussed § 8c(5)(G) although urged upon them by peti-

[47] 287 F. 2d at p. 730.

tioners.[48] Here, the government refers to the section only in a passing footnote (Mem. for Resp. p. 24, fn. 17) with the observation that the "argument was not asserted in the administrative proceedings, and is, therefore, not presented here. (citing cases.)"[49]

Adherence to the language, purpose, legislative history and policy of the Act would prohibit the exclusion of any milk, no matter where produced, and require competing handlers in the market to pay producers *for all milk disposed of therein* in accordance with the minimum prices established for the marketing area. That is the holding of *Kass v. Brannan*.[50] Whether such milk is "pooled" or is handled in some other way is a matter to be determined by the Secretary in accordance with the provisions of the Act.

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[48] *United States v. Lehigh Valley Cooperative Farmers, Inc.* 287 F. 2d 726 (3rd Cir. 1961), brief for appellees, p. 42.

[49] The Solicitor General said further: "It is, in any event, without merit. As Judge Learned Hand remarked, rejecting precisely this contention in his dissenting opinion in the *Kass case* (the majority of the court did not reach this issue), 'The plaintiff's argument * * * must be, that § 8c(5)(G) forbids any provision in an order, however necessary to protect a "pool", if in operation it will result in limiting the introduction of "products" into "the marketing area." I cannot believe that, when Congress decided to regulate the industry in order to assure a "uniform price" to producers, it meant by § 8c(5)(G) to forbid all protective measures, which should result in lessening the amount of "products" which without such measures would have entered the "marketing area" in question.' 196 F. 2d 791, 800. See also *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, 96-97 (C. A. 8), certiorari denied, 329 U.S. 788. Moreover, the compensatory payment provisions in question are applicable to nonpool handlers generally, wherever located, and thus have no reference to milk produced in a particular geographical 'production area', as contemplated by Section 8c(5)(G)." (Mem. for Resp., p. 24, fn. 17)

[50] Not even the dissenting opinion of Judge Learned Hand disputes the proposition: "What order, short of prohibition or limitation, the Secretary might adopt to protect the new system of 'pool plants' which he had set up, it was certainly for him to say within the limits of his statutory powers. One method might have been to restore to

In *Kass*, the second circuit clearly recognized that the Secretary was authorized by § 8c of the Act to limit the entry of milk into a regulated market only to the extent that its entry would destroy the price structure in the market. *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d, 87 (8 Cir. 1946), certiorari denied, 329 U.S. 788, cited by the government, does not hold to the contrary. Neither the facts nor the regulatory provisions involved in that case are applicable here. The *Bailey* case involved an individual handler pool rather than a marketwide pool.* Hence, there was no equalization or producer settlement fund to be concerned with. The contested provision in the St. Louis Market Order required the handler of "new producer milk" to allocate it to the lowest value so long as "producer milk" milk was available in the handler's plant undisposed of for Class I purposes. § 8c(5)(D) permits "down allocation" of the milk of "new producers" entering the market for a period of 60 days, a point that will be discussed *infra*.

Where Congress has intended to control or restrict the movement or marketing of commodities by producers it has done so in clear and explicit language. Section 8c(6) of the Act relates to agricultural commodities other than milk and provides for the establishment of market orders:

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the producers in a 'pool' what they had lost by the 'non-pool' competition of each handler; but that was patently impossible to determine, and nobody suggests that it should have been attempted. Another method was to impose upon a 'non-pool" handler the same cost that 'pool' handlers must pay, thus eliminating any inducement to poach, so to say, upon the local 'pool'. The provisions in suit were promulgated to effect this purpose; and I shall assume that they can be defended only on that ground. * * *" 196 F. 2d p. 798.

*In an individual handler pool, each handler in the market pays his producers a blend price determined by the handler's useage in each class rather than the marketwide use. See § 8c(5)(B)(i).

"(A) Limiting * * * the total quantities of any such commodity * * * produced during any specified period or periods, which may be marketed in or transported to any * * * market * * *.

"(B) Allotting * * * the amount of such commodity * * * which each handler may purchase * * * on behalf of producers, during any * * * periods, under a uniform rule based upon the amounts sold by such producers, etc.".

"(C) Allotting * * * the amount of any such commodity * * * which handlers may market * * * under a uniform rule based upon the amounts which each such handler has available * * *."

Section 8c(6), in its remaining paragraphs, contains explicit direction for limitations on marketing applicable to producers and handlers alike. The provisions of this section were before Congress when it considered the order provisions applicable to milk. Regulation of marketing through the imposition of marketing quotas under the Agricultural Adjustment Act of 1938[51] was upheld by this Court as a permissible exercise of power by Congress with respect to the marketing of tobacco in *Mulford v. Smith*, 307 U.S. 38. Here the Secretary has attempted to allocate markets and restrict producers to their "traditional," "normal," or "primary" outlets without the marketing quota authority provided by § 8c(6) and contrary to the provisions of § 8c(5) (G) explicitly prohibiting such restrictions.

The government argues that the challenged compensatory payment provisions are not inconsistent with § 8c(5) (G) because "the provisions in question are applicable to non-pool handlers generally wherever located and thus have no reference to milk produced in a particular geo-

[51] 52 Stat. 31, as amended.

graphical 'production area,' as contemplated by Section 8c(5) (G)." (Mem. for Resp. p. 25.) A similar argument was made by the Judicial Officer in *Kass*.[52] The argument falls, however, when the conditions for qualifying as a "pool plant" are examined. Only a plant located in New York, New Jersey or Pennsylvania may become a "pool plant" by making certain minimum shipments of fluid milk into the marketing area. (§§ 927.25 (b), 927.26, 927.27). A plant outside of the three-state area could, theoretically, become a "temporary pool plant" (with certain limitations) if at least 55 per cent of its milk received from dairy farmers is sold in fluid form and it distributes bottled milk in the marketing area. (§ 927.29(d)). However, a plant shipping milk products (Class II under Order No. 27) such as cream or concentrated products for use in fluid form cannot qualify as a pool plant *under any conditions* if it is located outside of the three-state area of New York, New Jersey and Pennsylvania.

The effect is particularly onerous on the milk production areas of the midwest. The relative bulk and perishability of fresh whole milk has, in the past, limited its economical movement over long distances. In recent years, however, improved means of moving milk under refrigeration coupled with universal pasteurization have permitted the expansion of fluid markets for midwestern milk. While transportation costs are an important factor in the economics of milk marketing with respect to whole milk, fluid cream and other concentrated products have a higher

[52] 8 Ag. Dec. 1083, 1105: "• • • [The] only distinction in the order as to sources of milk is between milk from 'pool' plants and milk from 'non-pool' plants • • • As far as the order provisions are concerned, however, any plant anywhere can become a 'pool' by meeting the prescribed conditions."

value in relation to their volume, permitting their economical movement over longer distances. The development of methods to overcome perishability and distance in the movement of fluid milk offers a means, therefore, of permitting the milk production areas of the midwest to reach markets heretofore barred by transportation costs.[53]

Because cream and concentrated fluid milk products are often obtainable by eastern and southern handlers from midwestern sources at a price below local supplies, marketing orders are constructed to eliminate this cost advantage and to discourage regulated handlers from purchasing such products from sources outside of the production area contiguous to the regulated marketing area. This is accomplished by applying to such "other source milk" the "compensatory payment" provisions challenged here. The payment extends not only to whole fluid milk but also to "concentrated fluid milk, fluid milk products, cream [and] fluid cream products * * *" (§ 927.83(a)). If such products are obtained by handlers from "non-pool" sources, the handlers are required to pay a compensatory payment based on an amount of milk equivalent to the fluid milk milk from which the concentrated products were processed (§ 927.83(b) (2) (3)) on theory that local supplies have, to that extent, been displaced. By requiring the compensatory payment provisions of the Order to be applied to the "milk equivalents" from which the products were processed, the Order effectively removes the handler's incentive to seek lower cost supplies outside the marketing area and thereby nullifies the technological innovations that would have permitted the midwest to overcome its location disadvantage.

[53]Mathis, A. G., *The Probable Impact of Milk Concentrates on the Fluid Milk Market*, Marketing Research Report No. 208, United States Department of Agriculture, February, 1958.

### 2. *Section 8c(5)(D) of the Act Provides the Sole Method of Protecting the Market Structure.*

In his Findings on the amendatory decision (R. 697a, 752a-756a), the Secretary notes that a "non-pool" handler distributing small amounts of milk in the marketing area may "have a choice of either pooling his entire receipts or of paying the full compensatory payment on his sales within the marketing area" (R. 755a). However, the option is limited to "only those handlers disposing of [55 per cent] of their milk for fluid use * * *" (R. 755a).

If the foregoing alternatives are too onerous, the handler need only shift his source of supply from those "dairy farmers" with whom he has long dealt to the "producers" favored by the Order. As stated by the Secretary (R. 756a):

> "All handlers located outside the defined marketing area who sell milk in the marketing area would not be required, of course, to choose one of the alternatives heretofore described. * * * Under the accounting procedure to be employed, milk received by [non-pool] plants from pool plants will be allocated first to Class I-A milk distributed in the marketing area. Unless sales in the marketing area by the outside dealer exceeded receipts from pool sources, neither full regulation of the outside dealer nor an obligation to make compensatory payments would result."

Under the latter alternative, petitioners, in order to continue selling milk in the marketing area, would be required to shift their source of supply to the market's "pool producers," while the "dairy farmers" thus deprived of

their market would, presumably, divert their milk to manufacturing uses or seek other outlets.[54]

The contested provisions of Order No. 27 are simply devices designed to expand a market for one group of producers at the expense of the other. Their invalidity is not cured by permitting petitioners to "elect" from a choice of equally burdensome alternatives. This Court said in *Stark v. Wickard,* 321 U.S. 288, 303-304:

> "The producer is not compelled by the order to deliver * * * but neither can he be required to market elsewhere and if he finds a dealer in the area who will buy his product, the producer by delivery of milk comes within the scope of the Act and the Order. * * * The Order could not bar any qualified producers in the milk shed from selling to area handlers. * * * Upon purchase of his milk by a handler, the statute endows the producer with * * * the right to be paid a minimum price."

None would question the need for some means to protect the price structure in a marketing area from the destructive competition of unregulated milk. Under a classified price system, "the incentive is present * * * to undercut the market * * * in order to convert * * * Class III sales into Class I sales" (Mem. for Resp., p. 17). Congress made express provision "to prevent assaults upon the price structure" of a regulated market through the adoption of § 8c(5) (D) of the Act, which reads as follows:

> "Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding

[54]When the State of New York similarly attempted to restrict a handler's source of supply, this Court said: "* * * a buyer has to buy where there is a willing seller, and the peculiarities of the milk business necessitate location of a receiving and cooling station for nearby producers." *Hood & Sons v. Du Mond,* 336 U.S. 525, 540.

> the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection."

The purpose of this section, together with its relationship to § 8c(5) (G), was explained by Justice Jackson in *Hood & Sons v. Du Mond*, 336 U.S. 525. In that case the State of New York had denied Hood a permit to buy additional milk supplies from New York producers for shipment into the Boston area. The grounds for denial were to protect and advance local economic interests. New York's regulatory scheme was similar in plan and purpose to the federal Act. It contended that "* * * such restraint or obstruction as its order imposes on interstate commerce does not violate the Commerce Clause because the state regulation coincides with, supplements and is part of the federal regulatory scheme. * * *" 336 U.S. 525, 540. In rejecting this argument Justice Jackson said at pages 543-545:

> "When it is considered that the Federal Act was passed expressly to overcome 'disruption of the orderly exchange of commodities in interstate commerce' and conditions found to 'burden and obstruct the normal channels of interstate commerce,' 7 U.S.C. § 601, it seems clear that we can not sustain the State's argument that its restrictions here involved supplement and further the federal scheme.
>
> "Moreover, we can hardly assume that the challenged provisions of this order advance the federal scheme of regulation because Congress forbids in-

clusion of such a policy in a federal milk order. Section 8c(5) (G) of the act provides:

"'No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.'

"While there may be differences of opinion as to whether this authorizes the Federal Order to limit, so long as it does not prohibit, interestate shipment of milk, see *Bailey Farm Dairy Co. v. Anderson*, 157 F. 2d 87, 96; *Bailey Farm Dairy Co. v. Jones*, 61 F. Supp. 209, 221 — *a question upon which we express no opinion* — it is clear that the policy of the provision is inconsistent with the State's contention that it may, in its own interest, impose such a limitation as a coincident or supplement to federal regulation.

"*The only federal restriction of handlers' purchases from new producers, found in § 8c (5) (B)* [*sic*][55], authorizes inclusion, in orders concerning milk or milk products, of a clause providing that for deliveries made during the first sixty days a new producer shall be paid only the minimum price applicable for milk of the particular use classification, subject to adjustments not relevant here. This provision was included in the 1935 amendment, 'to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural expansion of the area supplying any market * * *.' S. Rep. No. 1011, 74th Cong., 1st Sess., p. 11. And it was added, 'This is the only limitation upon the entry of new producers — wherever located — into a market, and it can remain effective only for the specified * * * period.' *Ibid.* The bill originally provided for a ninety-day minimum price

[55] § 8c(5)(D).

period but in conference the less restrictive sixty-day period was adopted. H.R. Rep. No. 1757, 74th Cong., 1st Sess., p. 21.

"The sections and reports indicate that it is the deliberate policy of the Congress to prevent federal officers from placing barriers in the way of the interstate flow of milk. * * * The purpose as expressed in § 1, 7 U.S.C. § 601, is to avoid conditions which burden and obstruct the normal channels of interstate commerce. The object of the federal program to raise and stabilize the price of products was to stimulate interstate commerce. The order of the Commissioner avows itself to have the opposite effect. It may claim neither federal sponsorship nor congressional sanction." (Emphasis supplied.)[56]

Section 8c(5) (D) is the exclusive method provided by the Act to deal with the competition of "new producers" or "other sour milk" and is wholly inconsistent with the market exclusion concept adopted by the Secretary in Order No. 27.[57]

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[56]See 79th Cong. Rec. 13022 (1935). Debates on Conf. Rep. H. R. No. 1757, 74th Cong. 1st Sess. Mr. Jones: "The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do not have the protection of this bill, they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. *Under the provisions of this bill if a price was fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area and comply with all regulations and requirements of that area. For the first 2 months he would be required to take the manufacturer's price.*" (Emphasis supplied.)

[57]See also TNEC Monograph No. 32, *Economic Standards of Government Price Control*, (1941) p. 79:

"(3) Entrance to the market is available under the orders to any milk producer who can find a dealer to whom to sell. The law specifically states: [quoting § 8c(5)(G) of the Act].

"New producers, however, enter the market at some tempo-

## II

## THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 ARE CONTRARY TO § 8c(5)(A) AND, CANNOT, THEREFORE, BE AUTHORIZED BY § 8c(7)(D) OF THE ACT.

Section 8c(5) (A) of the Act provides for the fixing of prices for each use classification "which all handlers shall pay * * *." It provides further:

> "Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, * * * and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers."

Handlers pay into or withdraw from the "Producer Settlement Fund" such sums as their utilization discloses to permit them to pay producers the "blend" price "to the end that total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection." (§ 8c(5) (C).)

In *Kass v. Brannan*, 196 F. 2d 791, the Second Circuit observed that the effect of the compensatory payments required in that case: "is to add an additional cost to the original price of the non-pool milk or milk product which

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rary price disadvantage, intended to restrict the market to regular suppliers: [quoting § 8c(5)(D) of the Act].

"This appears to mean that any restriction to the entry of producers into a market *must* be found in the older form of control by the cooperative or refusal of the health authority to inspect farms or to qualify milk for sale in the market, except insofar as the payment only of low class milk prices for long periods in itself constitutes a bar to market entry." (Emphasis supplied.)

is paid by the handler, not to the seller or original producer, but to the regular suppliers of the New York market who did not deliver the milk or milk products to him." The Court held (196 F. 2d at p. 796):

> "* * * the result of the exaction of a penalty computed on the basis of the New York Class IV-A price rather than the actual cost to the handler is a price discrimination between a handler who purchases non-pool milk products and one who purchases pool milk products, although each makes the same use of such products in the New York marketing area. This in our opinion is contrary to the requirements laid down in section 8c(5) (A) that the minimum prices for each use classification shall be uniform as to all handlers."

The court below, rejecting the *Kass* reasoning and holding, stated (1): "Section 8c(5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs." (287 F. 2d at p. 730); (2) "Section 8c(5) (A) has no application to non-pool handlers." (287 F. 2d at p. 731); (3) "Section 8c(5) (A) * * * in no way dictates equalized costs between pool handlers or between pool and non-pool handlers." (287 F. 2d at p. 732).

In *Kass*, the court noted that "[t]he Act itself does not define 'producers' but it is clear from the context that the term refers to dairy farmers who supply the milk which the handlers market." (196 F. 2d at 795). In the case at bar, on the other hand, the court below assumed that only those "producers" defined by the Order are entitled to the benefits of the Act. Hence, the "price discrimination" between pool and non-pool handlers struck down in *Kass* was upheld by the court below as necessary to "the integrity of the regional marketing scheme" and to protect

"producers" against "loss of the Class I fluid milk utilization in the marketing area." (287 F. 2d at p. 730).

## A. The Compensatory Payment Provisions of Order No. 27 Unlawfully Discriminate Among Handlers in the Marketing Area Contrary to the Provisions of Section 8c(5)(A).

During the promulgation proceedings a proposal was made that a "handler outside the marketing area be required only to pay to his producers the utilization value of milk according to the class prices established under the order" (R. 754a). This proposal was rejected by the Secretary in his amendatory decision on the grounds that:

> "The handler in the area * * * has to equalize his utilization with other handlers, and his producers are paid on the basis of a uniform price reflecting the utilization in the market as a whole rather than the utilization of his handler. It would be inequitable to a handler in the marketing area to require him to equalize his utilization while letting a handler outside the marketing area avoid equalization on milk sold in the area. *An unfair advantage would accrue to the nonpool handlers in competition for producer supplies*, and the entire program of marketwide equalization would be in jeopardy. Although it is not the purpose of the order to bring complete equality between regulated and unregulated handlers, it should at least provide equity between such handlers with respect to milk sold in the marketing area both as to class prices and as to payments to producers." (Emphasis supplied.) (R. 754a)

The government makes the same argument here when it says (Mem. for Resp., p. 13):

> "* * * the nonpool operator who has a higher ratio of Class I sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he could afford to pay his farmers a price based on his own utilization of the milk."

In support of the need for compensatory payments on non-pool milk paid for at or above the class prices established under the Order, the government further argues (Mem. for Resp., pp. 15-16):

> "A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York - New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order) —*i.e.*, a blend price based on the particular handler's own utilization. Such a handler could account to his own farmers at the full Class I price for any fluid milk sold in the marketing area and thereby avoid making compensatory payments. * * *
>
> "The same would be true, though to lesser extent, of a handler who is unregulated and needs to pay his farmers simply the going market price, which would normally be * * * the New York blend price. * * * By using the New York - New Jersey market to dispose of his otherwise surplus milk * * * he could * * * increase the utilization value of that milk from the Class III price to the blend price. Combined with his Class I sales outside the marketing area, that would give him an overall utilization value greater than the marketwide pool average and thus enable him to pay more to his farmers than the New York blend price. * * *"

In substance, the foregoing arguments amount simply to this:

(1) Some handlers selling Class I milk in and out of the regulated area have a higher proportion of fluid sales than others, enabling them to return a higher price to their suppliers.

(2) The compensatory payment provisions of Order No. 27 removes that advantage and reduces the power to outbid pool handlers for producer supplies.

The promotion of orderly marketing is achieved, according to this theory, by equalizing the price received by all "producers" and "dairy farmers" who sell all or a part of their production in the same marketing area. The requirement of § 8c(5)(A) that "prices shall be uniform as to all handlers" is thus amended to require instead that "prices shall be uniform as to all 'producers' and 'dairy farmers' whose milk is sold in whole or in part in the same marketing area." It can easily be demonstrated that such a result is neither permitted by the Act nor was it intended by Congress.

The purpose of the Act is to maintain reasonable prices for milk producers by promoting orderly marketing conditions. 7 U.S.C. § 602, *United States v. Rock Royal Coop, Inc., supra.* The Act was a response to the collapse of the pricing system during the early thirties which, in turn, was attributable to the total loss of bargaining power on the part of producers. In the face of tremendous surplus and a loss of consumer purchasing power, handlers *competing in the same market* were able to force producer

prices to levels that made it impossible for them to stay in business.[58]

The *Nebbia* case established the constitutional power of a state to regulate the pricing of milk. This Court recognized, there, that unequal acquisition costs among competing handlers in a market results in "price-cutting and other forms of destructive competition" (291 U.S. at p. 518) leading finally to a deterioration in producer prices.[59] The remedy adopted by the New York legislature "as a method of correcting the evils" (291 U.S. at p. 518) was the establishment of a board with the power to fix prices to be "charged or paid for milk in any form * * *. It shall be unlawful for a milk dealer to sell or buy * * * milk at any price less or more than such price * * * whether by any discount, or rebate * * *" (291 U.S. at p. 519).

The measures adopted were designed to remove differential milk costs among *competing* handlers. Unless that

[58] *Nebbia v. New York*, 291 U.S. 502, 517.

[59] * * * "A satisfactory stabilization of prices for fluid milk requires that the burden of surplus milk be shared equally by all producers and all distributors in the milkshed. So long as the surplus burden is unequally distributed the pressure to market surplus milk in fluid form will be a serious disturbing factor. The fact that the larger distributors find it necessary to carry large quantities of surplus milk, while the smaller distributors do not, leads to price-cutting and other forms of destructive competition. Smaller distributors, who take no responsibility for the surplus, by purchasing their milk at the blended prices (i.e., an average between the price paid the producer for milk for sale as fluid milk, and the lower surplus milk price paid by the larger organizations) can undersell the larger distributors. Indulgence in this price-cutting often compels the larger dealer to cut the price, to his own and the producer's detriment.

"Various remedies were suggested, amongst them united action by producers, the fixing of minimum prices for milk and cream by state authority, and the imposition of certain graded taxes on milk dealers proportioned *so as to equalize the cost of milk and cream to all dealers and so remove the cause of price-cutting.* (Emphasis supplied.) 291 U.S. at p. 517.

were done, the "disorderly marketing conditions" that the New York act was designed to deal with would have continued unabated, frustrating the purpose of the law.[60]

Classified pricing under state regulation failed when this Court held in *Baldwin v. Seelig*, 294 U.S. 511, that New York was powerless to exclude from its market "milk paid for in Vermont below the New York minimum" (294 U.S. at p. 524). Because of that limitation on state power, Congress legislated to accomplish the same objectives sought by New York[61] and other states.

Sections 8c(5)(A), (B) and (C) provide the method for assuring "that the total sums paid by each handler shall equal the value of the millk purchased by him at the prices fixed in accordance with" the Act. It is the uniformity of price *paid by handlers competing for the same business*, not the price received by producers, that stabilizes the market and removes the handler's incentive to cut the producer's price.

The Act does not attempt to equalize returns for all producers in the market as the government argues here. Section 8c(5)(B), for example, provides for location and other differentials borne by the producer not the handler.[62]

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[60] *Nebbia v. New York*, supra, at p. 530.

[61] *United States v. Rock Royal Coop, Inc.*, 307 U.S. at p. 549: • • • "A later New York act, the Rogers-Allen Act, authorized the state commissioner to cooperate with the federal authorities acting under the present Marketing Agreement Act, and to issue orders supplementary to those of the Federal Government to be carried out under joint administration."

[62] "The purpose of the [location] differentials is to make it possible for handlers to procure milk throughout the supply area at a delivered cost that is uniform with that of other handlers." See fn. 23 *supra*.

Nor is it the purpose of the Act to eliminate differential returns to producers arising from different marketing practices of their handlers. In *United States v. Rock Royal Coop, Inc., supra,* this Court rejected the argument that the government urges here, stating (307 U.S. at p. 566):

> * * * "It is erroneous to suppose that by buying some milk at less than the minimum, the 'actual price' paid for milk sold in the marketing area is reduced. The price paid for all milk sold by proprietary handlers in that area is the uniform price. Unpriced milk from the same producer may be bought for less. The average paid the producer may be below the minimum *but for the part sold in the marketing area or passing through plants there located* the minimum is paid." (Emphasis added)

Here, as in *Rock Royal,* dairy farmers supplying petitioners may indeed receive a higher return for their milk than the "pool producers" regulated under Order No. 27. That, however, "is a competitive situation which the Order did not create and with which it does not deal" (307 U.S. at p. 566). Here the government seeks to accomplish precisely what this Court rejected in *Rock Royal* as outside of the purpose of the Act.

That a handler may be able to pay his producers *more* than the minimum Order price cannot impair or frustrate the "effectiveness of the regulatory scheme" (Mem. for Resp., p. 13). There is nothing in the Act to bar a "producer [from selling] to the handler for any price above the minimum." *Stark v. Wickard,* 321 U.S. 288, 303. In fact, the Act itself permits differential pricing to producers supplying handlers under the same order. Section 8c(5)(F) provides:

> "Nothing * * * in this subsection is intended or shall be construed to prevent a cooperative marketing

> association * * * engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers * * *."

The section applies to a cooperative in its capacity as handler in the market. The effect of the provision is to virtually assure a lack of uniformity in the "uniform price" received by "producers" in Order No. 27. "Producers" supplying proprietary handlers receive the "uniform price" established by the Order. Neighboring "producers" who are members of cooperative A might receive a different price, while still other "producers," who are members of cooperative B, could receive yet another price—"in accordance with the contract between the association and its producers."[63]

While the price received by producer-members of a cooperative may vary from the "uniform price," cooperative handlers competing in the same market with other handlers, "equalize their purchases by payments into the producer settlement fund, even though they are not required to pay the uniform price to their producers * * *" (*United States v. Rock Royal Coop, Inc.*, 307 U.S. at p. 579). By requiring the cooperative handler to account to the equalization pool in accordance with the amount of milk that it has disposed of in each class, "equality of cost"

[63]See *United States v. Rock Royal Coop, Inc., supra* at p. 561, 565: "The cooperative member measures his return by the market or uniform price the business handler pays. * * * If distributions do not equal open prices, the cooperator's reactions would parallel those of stockholders of losing businesses. Neither the Act nor the order protects anyone from lawful competition, nor is it essential that they should do so."

among competing handlers is maintained and the "cause of price-cutting" and unstable marketing conditions (*Nebbia v. New York, supra*) is removed.

## B. The Compensatory Payment Provisions of the Order Are Not Authorized by Section 8c(7)(D).

As already noted, orders issued pursuant to the Act may contain only the "terms and conditions provided by § 8c(5), "and (except as provided in [§ 8c(7) (D)]) no others." The government does not attempt to argue that authority for the challenged regulations is found in § 8c(5) or any of its subdivisions.[64]

Section 8c(7) (D) authorizes inclusion in milk orders of provisions: "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order." If the compensatory payment provisions of Order No. 27 are contrary to any of the paragraphs of § 8c(5), then they are necessarily inconsistent with the terms and conditions specified in that subsection. The government would avoid that result by simply withdrawing "non-pool handlers" from the provisions of § 8c(5) and by discovering a source of regulatory power in § 8c(7) (D) applicable only to handlers of outside milk. The government argues, "the compensatory payment provisions, being applicable only to handlers who are not subject to the pooling provisions specified in Section 8c(5), cannot be 'inconsistent' with those pro-

[64] "* * * Section 8c(5)(A) is neither the source of the authority for, nor in any way concerned with the terms of, the incidental regulation of handlers who are not subject to the pooling requirements of the order. The source of that regulation is instead Section 8c(7)(D) * * *" (Mem. for Resp., p. 23).

visions and, being necessary to prevent the purposes of the pooling provisions from being undermined by the unregulated competition of non-pool handlers are 'necessary to effectuate' the pooling provisions. Hence, as the court below concluded, they are fully authorized by Section 8c(7) (D)." As we show below, the argument is a clear *non sequitur.* (Mem. For Resp., p. 24).

### 1. *The Compensatory Payment Provisions of Order No. 27 Are Neither Incidental To Nor Consistent With the Terms and Conditions Authorized by the Act.*

Section 8c(7) (D) is intended only to provide administrative flexibility by permitting the Secretary "to include provisions auxiliary to those definitely specified." *United States v. Rock Royal Coop., Inc.*, 307 U.S. at p. 576. The "incidental" power of the Secretary to include provisions not specifically granted by § 8c(5) was fully considered by this Court in *Brannan v. Stark*, 342 U.S. 451. There, the Secretary had included a provision in the Boston milk order authorizing a deduction to be made from the pool to provide "market service payments" to cooperatives alone. The deductions reduced the uniform price that could be paid to all producers. The Secretary claimed that § 8c(7) (D) authorized the provision. In holding the challenged provisions unauthorized by § 8c(7) (D), this Court said (342 U.S. at p. 462):

> * * * "We note at the outset that § 8c(5) states in specific and lengthy detail the provisions which may be included in milk marketing orders. That subsection lays down comprehensive directions for classification, pricing, and the operation of the equalization pool mechanism, particularly as to adjustments and

> deductions employed in determining the blended price. * * * Section 8c(7) authorizes a congeries of general terms which may be included in all marketing orders, including those dealing with commodities other than milk and milk products. * * * it is claimed that the contested provisions are of such basic importance that their validity may be crucial to the success of the whole milk marketing program. We do not think it likely that Congress, in fashioning this intricate marketing order machinery, would thus hang one of the main gears on the tail pipe. * * *
>
> "The payments * * * are inconsistent with § 8c(5)(A), which provides that all handlers shall pay uniform prices for each class of milk, subject to certain adjustments * * *."

To insist, as the government has here, that the compensatory payment provisions are essential to the "effectiveness of the regulatory scheme" or to argue, as did the court below, that their removal from the Order "would impair the integrity of the regional marketing scheme" (287 F. 2d at p. 730) or "[stifle] the effectiveness of the whole plan" (287 F. 2d at p. 731) hardly accords with the incidental authority of § 8c(7) (D) described by this Court in *Brannan v. Stark, supra.* For here, as in *Stark*, it is unlikely "that Congress, in fashioning this intricate marketing order machinery," intended that the administrator should "hang one of the main gears on the tail pipe."[65]

In *F.P.C. v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, this Court considered the "incidental powers" of the Commission to do all things appropriate to carry out the

[65] "Certainly an incidental power can avail neither to create powers which, expressly or by reasonable implication, are withheld nor to enlarge powers given; but only to carry into effect those which are granted." *First National Bank v. Missouri*, 263 U.S. 640, 659."

purposes of the Federal Power Commission Act. The F.P.C. is given broad powers over the "transportation or sale of natural gas subject to the jurisdiction of the Commission," (337 U.S. at p. 508). The Commission argued that it had the power to approve or disapprove transfer of certain leases over natural gas reserves owned by Panhandle. Extensive administrative findings were made that since natural gas is the "lifeblood" of a pipeline system, a company could, by disposing of its reserves, render itself unable to continue service and this without the Commission's consent. The Court held that this alleged necessity of protecting the Commission's grant of authority was no substitute for the failure of Congress to grant additional authority (337 U.S. at pp. 515-516):

> "If the Commission is of the opinion that it should have the power to control the disposition of leases by natural gas companies, it is authorized to call the attention of Congress to that fact."

Similarly, in *F.T.C. v. Bunte*, 312 U.S. 349, the statute gave the F.T.C. authority over unfair competition in interstate commerce. It was argued that certain intrastate sales which "affect" interstate commerce must also thereby be deemed subject to F.T.C. jurisdiction because the Commission had found that such sales enabled persons "in the Illinois market to compete unfairly with manufacturers outside of Illinois." The Commission urged "that it may also proscribe unfair methods used in intrastate sales when these result in a handicap to interstate competitors." In denying the Commission such power, this Court said (312 U.S. at p. 355):

> "This case presents the narrow question of what Congress did, not what it could do."

Here, too, it is argued that "producers" must have market protection against loss of Class I sales by imposing a charge against the milk of "dairy farmers who are not producers." Congress not only withheld such authority; it adopted § 8c(5)(G) to guard expressly against the danger that such power would be assumed.

### 2. *The Challenged Provisions Are Not Necessary to Effectuate the Other Provisions of the Order.*

The government and the court below contend that the challenged provisions of the order are necessary to prevent the destructive competition of unregulated milk and to retain a market for the area's "producers." While arguing, on the one hand, that the provisions are "necessary to effectuate the essential purpose" of the Act and the Order, it is asserted, on the other hand, that the provisions are merely "ancillary" to other authorized provisions for pooling and pricing.

It is a sufficient answer to the claimed "necessity" that the Act operated for eight years without the challenged payment provisions and the Secretary has not found it necessary to include such provisions in many orders now in effect. (Mem. for Resp. p. 16).

It is also claimed that the "partial regulation" of non-pool handlers through the device of compensatory payments is the only method available to the Secretary to protect the pool while at the same time permitting non-pool handlers to continue to do a small part of their business in the marketing area. (Mem. for Resp. p. 13). The alternative, according to the court below (287 F. 2d at 731), and the government (Mem. for Resp. p. 14) is full regula-

tion of all of petitioners sales, or no regulation at all. The latter, it is argued, would destroy the price structure in the market by permitting entry of "cheap milk" bought from unregulated sources. Full regulation would subject petitioners to equalization payment on *all* their fluid sales though selling only about 5 per cent of their milk in the marketing area. The burden of such payments would disable petitioners from competing with other handlers in the unregulated areas where they do most of their business. The government and the court below assert that *Titusville Dairy Products Co v. Brannan*, 176 F. 2d 332 (3d Cir.), certiorari denied, 338 U.S. 905, authorizes such full regulation under Order No. 27 on sales made outside the marketing.

In *Rock Royal and Hood*, cited *supra*, the Secretary never attempted to regulate milk sold outside of the marketing area. Such milk, though from the same producer or production area, was "unpriced" and was not included in the computation of the uniform price. (307 U.S. 533, 564). The Act provides the mechanism for the pricing and pooling of all milk sold in the marketing area including the sales made here by petitioners. The Act regulates handlers *with respect to milk sold in a regulated area*. The Secretary is permitted to issue an order fixing prices whenever he finds "that the parity prices of [milk] are not reasonable in view of * * * the economic conditions which affect market supply and demand for milk * * * *in the marketing area to which the contemplated* * * * *order* * * * *relates*" (emphasis supplied) (§ 8c(18).) How can the need for regulation in New York or a part of New Jersey justify an exercise of the same regulatory power in Delaware or Pennsylvania, absent a determina-

tion by the Secretary that economic conditions in those areas also require issuance of a marketing order?

The claimed authority, based upon the *Titusville Dairy* case, cited *supra*, is wholly without statutory support. The case is no authority for the claimed power of the administrator of Order No. 27 to regulate a handler with respect to milk sold outside of the area. The Order defined Titusville as a handler because it held a health department permit. Having accepted the benefits of the Order by withdrawing equalization payments, and having failed to challenge the 1941 amendment regulating the milk of handlers "wherever sold," the court determined only that *Titusville* could not accept the Order's benefits without sharing its burdens.[66]

## III

## THE CHALLENGED PROVISIONS BURDEN AND OBSTRUCT THE CHANNELS OF INTERSTATE TRADE AND CONFLICT WITH ANTITRUST POLICY

Congress has not deemed strict application of the antitrust laws appropriate to our agricultural economy. When demand for agricultural commodities falls off or when over-expansion of productive facilities gluts the market and depresses prices, equitable balance is not readily reestablished, in the absence of government intervention,

[66]As a handler Titusville had collected from the producer settlement fund more than $55,000 (176 F. 2d at p. 334). The court did not consider the status of "handlers" not approved by the New York Health Department but qualified by United States Public Health Service and Department of Agriculture approval to supply federal installations in the marketing area; nor did it consider whether the refusal of the New York Department of Health to approve a dealer could affect his "right" to sell milk in the marketing area. See *Dean Milk Co. v. City of Madison*, 340 U.S. 349.

without extreme hardship and serious dislocation to the farm population.[67] The Agricultural Marketing Agreement Act of 1937 is one of the measures provided by government to strengthen the dairy farmers' bargaining position and maintain prices at reasonable levels. Faced with the superior organization and market power of handlers, milk producers bore the brunt of the competitive efforts of handlers to maintain their market in the face of low demand. The Act was adopted to permit handlers and producers to fix prices in a market area under public supervision. Such marketing agreements (§ 8b) were by the terms of that section granted immunity from the anti-trust laws when adopted in accordance with the terms of the Act. Upon the adoption of a marketing agreement fixing prices in a regulated area, the Act provided that the Secretary should issue a marketing order if favored by producers (§ 8c(8)). In practice, however, orders are issued without marketing agreements in accordance with the provisions of § 8c(9).

The decision below and the arguments of the government here are an attempt to extend the Act beyond its permissible limits. The decision and the arguments are based upon a separation of milk producers into "producers" and "dairy farmers who are not producers," pre-empting to the former all of the fluid milk business in the regulated area. The avowed purpose of §§ 927.83 and 927.84 is to grant "producers" under the Order the exclusive right to all of the Class I sales of milk in the marketing area. The dairy farmers thus foreclosed are required either to divert their milk to manufacturing uses or to seek outlets in

[67]See Johnson, Gale D., *Government and Agriculture: Is Agriculture a Special Case?* 1 J. of Law and Economics, (1958) p. 122.

other areas. The challenged provisions in effect grant "producers" a "full supply contract" tied to a classified price plan for all of the milk sales in the regulated area.[68] While the Act permits the latter, nowhere does it authorize the former.

Unless otherwise authorized by law, exclusive dealing or exclusive supply arrangements which foreclose competitors from any substantial market are unreasonable per se and constitute an unlawful restraint of trade. *Standard Oil Co. of California v. United States*, 337 U.S. 293. In the *Standard Oil* case, it was observed that such contracts may often be beneficial to the buyer, the seller and the consuming public. (337 U.S. at p. 309.) However, if established suppliers grow stronger through such contracts and late-comers are prohibited from entering the market:

> "* * * it would seem unimportant that a short-run by-product of stability may have been greater efficiency and lower costs, for it is the theory of the antitrust laws that the long-run advantage of the community depends upon the removal of restraints upon competition" (337 U.S. at p. 309).

Recently this Court held that a cooperative association of milk producers which had acquired distribution facilities for the purpose of foreclosing a market to other producers violated § 3 of the Sherman Act and § 7 of the Clayton Act. *Maryland and Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458. The government's complaint under § 7 of the Clayton Act charged the Association with acquiring an independent dairy in order to:

[68]See, *United States v. Maryland & Virginia Milk Producers Assn. Inc.*, 90 F. Supp. 681.

> "eliminate the largest purchaser of non-Association milk in the area; force former Embassy non-Association producers either to join the Association or to ship to [another market], thus both bringing more milk to the Association and diverting competing milk to another market; eliminate the Association's prime competitive dealer from government contract bidding; and increase the Association's control of the Washington market." (362 U.S. at p. 469.)

By eliminating the competitor and diverting competing milk to another market, the Association hoped to eliminate "Embassy's price cutting and its generally 'disruptive' competitive practices that had made Embassy a 'thorn in the side of the Association for many years.'" (362 U.S. at p. 470.)

While § 8b of the Act exempts from the coverage of the antitrust laws authorized marketing agreements entered into under the Act, Congress did not intend wholly to immunize the marketing of milk from those laws. *United States v. Borden Co.*, 308 U.S. 188. In the *Borden* case it was claimed that the Act had destroyed the applicability of the Sherman Act to the marketing of agricultural commodities. But this Court said (308 U.S. at p. 198):

> "While effect is expressly given * * * to agreements and orders which may validly be made by the Secretary * * * there is no suggestion that in their absence, and apart from such qualified authorization and such requirements as they contain, the commerce in agricultural commodities is stripped of the safeguards set up by the Anti-Trust Act * * *. We are unable to find that such a grant of immunity by virtue of the inaction, or limited action, of the Secretary has any place in the statutory plan."

The only price fixing and market exclusion devices permitted by the Act are those contained in §§ 8c(5)(A) and 8c(5)(D). The Act permits the Secretary to include in a milk order the terms and conditions authorized by § 8c(5) and "no others" except "incidental" terms and conditions necessary to "effectuate the other provisions" of the Order.

The power to accomplish a purpose uniformly condemned as contrary to public policy cannot be characterized as "incidental." Congress has granted milk producers and handlers the right to enter into price fixing agreements without running afoul of § 1 of the Sherman Act. The court below and the government would now extend that immunity to include arrangements prohibited by § 3 of the Sherman Act and § 7 of the Clayton Act. In *Associated Industries of New York v. Ickes*, 134 F. 2d 694 (2d Cir.), dismissed as moot 320 U.S. 707, the court said (at p. 705):

> "* * * the common law has always zealously regarded competition as inherently desirable. And Congress has usually reinforced that policy legislatively, as manifested in the Anti-Trust laws, except in unusual circumstances such as those which induced the passage of the [Bituminous Coal Act of 1937]; since such a statute is patently an exception, it should surely be construed, if possible, in such a way as not to blot out all protection to consumers. As respondents themselves freely acknowledge in their briefs, several sections of the Act show that Congress (recognizing that this legislation was granting immunity to coal producers from the provisions of the Anti-Trust Laws) was bent on giving adequate offsetting protection to consumers. Thus § 4 II(a) provides that minimum prices proposed as a basis for co-ordination 'shall have due regard to the interests

of the consuming public,' and § 4 II(c) refers to protection of 'the consumer of coal against unreasonably high prices therefor.' "

A similar protection is afforded the public interest by § 2[69] of the Agricultural Marketing Agreement Act. It should not be eroded by extending provisions of the Act to permit the foreclosure of markets to qualified producers.

## CONCLUSION

Restrictions and limitations inhere in all economic regulatory measures. The question is: what limitations, what restrictions does the law permit? The Secretary may neither achieve ends that the Act forbids, nor may he employ unauthorized means to accomplish its legitimate objectives.

The sole statutory basis for the challenged provisions is asserted by the government and the court below to rest in § 8c(7)(D). The exclusionary provisions, it is claimed, are necessary for the administration of the Act. This court has recently held that administrative necessity cannot authorize an exercise of power withheld by Congress. *Denver Union Stock Yard Co. v. Producers Livestock Marketing Association*, 356 U.S. 282, 298. There, the Court struck

[69] "It is declared to be the policy of Congress—

"(1) • • •

"(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of the section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section."

down regulations sanctioned by the Secretary of Agriculture under the Packer and Stockyard Act, 7 U.S.C. § 181 et seq. The regulations complained of gave the Denver Stockyard Company a monopoly in the marketing of all livestock produced "within the normal marketing area" of the Denver yard. This Court found that the plain words of the Act prohibited the discriminatory regulations that would have permitted stockyard owners to compel marketing agencies to enter into exclusive dealing arrangements, stating "[i]f the Act does not fit the present economics of the business, a problem is presented for the Congress."

The challenged provisions of Order No. 27 are designed, avowedly, to exclude from the market "outside producers." Sec. 8b exempts from the coverage of the antitrust laws *authorized* marketing agreements entered into under the Act, but the narrow price fixing and market exclusion devices permitted by §§ 8c(5)(A) and 8c(5)(D) should not be permitted, by an arrogation of power, to be extended to accomplish a purpose uniformly condemned as contrary to public policy.

For the foregoing reasons the State of Minnesota urges that the decision of the court below be reversed and that the compensatory payment provisions of Order No. 27 be declared unauthorized by the Act.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

**No. 79—October Term, 1961**

LEHIGH VALLEY COOPERATIVE FARMERS, INC.,
and
SUNCREST FARMS, INC.,
*Petitioners,*

against

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,
*Respondents.*

## BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF AFFIRMANCE

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IN THE

# Supreme Court of the United States

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*Petitioners,*

*against*

UNITED STATES OF AMERICA AND EZRA TAFT BENSON, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,

*Respondents.*

## BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK, *AMICUS CURIAE*, IN SUPPORT OF AFFIRMANCE

### Opinions Below

The opinion of the District Court (R. p. 210a) is reported in 183 F. Supp. 80 (1960). The opinion of the United States Court of Appeals, Third Circuit, is reported in 287 F. 2d 726 and is printed at page 898 of the Transcript of Record. This Court granted certiorari June 19, 1961. (366 U. S. 957.)

### Jurisdiction

The jurisdictional facts are recited in the Petition for the Writ of Certiorari.

## Question Presented

The principal question is whether or not the section of the order requiring compensatory payments (7 C. F. R. § 927.83) by handlers through the producer settlement fund to pool producers on milk delivered to non-pool plants by dairy farmers for sale in the marketing area is in conflict or is inconsistent with the uniformity requirement of § 608c(5)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. §§ 601 *et seq.*).

## Statutes and Regulations Involved

The statute is found as the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U. S. C. §§ 601 *et seq.*). The regulation is in the form of an order known as the New York-New Jersey Milk Marketing Order, 7 C. F. R. §§ 927.1 *et seq.* (commonly referred to as Order 27) and in particular § 927.83 (R. pp. 879a-882a).

## Statement

### (New York's Interest)

The statement of the case set forth in the brief of the Secretary of Agriculture is adopted. However, we deem it necessary to add that there exists between the Secretary and the Commissioner of Agriculture and Markets of New York a cooperative administrative arrangement pursuant to which Order 27 functions. This integration is expressed in the form of a Memorandum of the Principles of Cooperation (Appendix A, p. 13) and is effectuated by a companion state order.

Cooperative federal-state regulation is authorized by both federal and state statutes. The federal act provides [7 U. S. C., § 610(i)]:

"The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: *Provided*, That information furnished to the Secretary of Agriculture pursuant to section 608d (1) of this title shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 608d (2) of this title."

The state statute provides (N. Y. Agriculture and Markets Law § 258-n):

"The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint

> hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders."[1]

The Secretary of Agriculture and the Commissioner of Agriculture and Markets agreed that

> "It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders * * * and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders" (Appendix A, p. 13).

The Secretary and the Commissioner, pursuant to law and their compact, held joint hearings in 1938 prior to the initial promulgation of Order 27, and federal and state orders as issued were based on the record of the joint hearings and were concurrent and complementary. In adopting Order 27, the Secretary said (3 F. R. 1951):

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[1] By L. 1961, ch. 842, § 2, the New York legislature added a new second paragraph to § 258-n, reading as follows: "In order to carry out the policy set forth in section two hundred fifty-eight-k, the commissioner is hereby vested with the authority to enter into a compact or compacts with the legally constituted authorities of other states and/or the United States to provide for uniform milk control and, in order to effectuate such uniform milk control, he may join with an agent or agencies to exercise under such compact or compacts the powers conferred upon him by this article with respect to the administration of uniform milk control. Any such compact or compacts may provide for necessary assessments upon the handlers regulated thereunder, in order to cover the cost of administering such uniform milk control, including, without limitation, the cost of auditing milk dealers' classifications."

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary * * *" (See R. p. 26, in *United States* v. *Rock Royal*, 307 U. S. 533).

In the state order the Commissioner said:

> "WHEREAS, the Secretary of Agriculture of the United States has determined to promulgate and make effective his Order No. 27 regulating the handling of milk in the aforesaid New York Metropolitan Milk-Marketing Area;
>
> "NOW, THEREFORE, I, Holton V. Noyes, the Commissioner of Agriculture and Markets of the State of New York, pursuant to the terms and provisions of the Agriculture and Markets Law, as amended, and in accordance with the power and authority in me vested, do hereby adopt and promulgate Official Order No. 126, said order to become effective concurrently with and to be complementary to such similar Order No. 27 to be made effective by the Secretary of Agriculture of the United States" (Appendix B, p. 19).

The language of the compensatory payment provision of the state order is the same as that of the federal order provision (Appendix C, p. 21).

Similar joint hearings have been held and upon their records concurrent and complementary amendments have been made over the years. The Memorandum of the Principles of Cooperation is still in effect.

Since 1938 federal-state milk regulation in New York has been administered by a Market Administrator appointed jointly by the Secretary and the Commissioner, and, by delegation of authority to him, the Administrator has been clothed simultaneously with all the authority, both federal and state, pursuant to the respective statutes. This au-

thority he exercises jointly—not separately. There is a single milk pool which is both federal and state as a joint operation and a single regulatory program.[2]

In 1957 the marketing area was extended (as of August 1) to northern New Jersey (22 F. R. 4643) and as thus amended continued in effect the requirements for compensatory payments (R. p. 817a; 22 F. R. 4221-4222).

Therefore, New York's interest is in sustaining the compensatory payment provision because if not workable under the federal part, then there is serious question as to the validity of that provision of the New York Order. Economically, New York's interest is substantial. Milk production and distribution are a paramount industry of the state (*Nebbia* v. *New York*, 291 U. S. 502, 517) and the people of its great cities depend largely upon an adequate supply of pure fresh milk. "So essential is it for health that the consumer has been willing to forego unrestricted competition from low cost territory to be assured of the producer's compliance with sanitary requirements, as enforced by the municipal health authorities" (*United States* v. *Rock Royal*, 307 U. S. 533, 570).

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[2] The integrated regulatory scheme is described by Mr. Justice Black in *Hood & Sons* v. *DuMond*, 336 U. S. 525, 560, *viz.*: "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers. 48 Stat. 31, 7 U. S. C. § 601."

## ARGUMENT

**I. If partially-regulated handlers may sell fluid milk in a regulated market, they will replace equivalent sales by fully regulated handlers. This will lower the price to all fluid producers who supply the regulated market by forcing more of their milk into lower price surpluses, and it gives the partially-regulated handler the advantage of dumping his surplus in the regulated market, all to the disruption of the regulation. The prevention of this consequence justifies the imposition of the compensatory payment requirement.**

The District Court reached the conclusion that there is sufficient evidence to support a finding of need for some form of regulation of the sale of milk and its products by non-regulated handlers in the Order 27 area. (Clary, J. R. p. 226a.)

The compensatory payment form chosen by the Secretary would produce the desired result were it not for the claim that it runs afoul of § 608c(5)(A) of the Act. It is not the function of this *Amicus Curiae* to attempt to distinguish *Kass* v. *Brannan*, 196 F. 2d 791, on either the facts or the law. That has been done by the Court of Appeals.

Uniformity of price does not necessarily mean identical exactness to every handler under and outside the order. The word "uniform" as applied to a statute or rule is that it is of unvarying standard and not different at different times or places as it affects a group or section. A statute is said to be uniform in its operation when it operates equally upon all persons who are brought within the relations and circumstances provided for. A tax statute is said to be uniform when it has the essential of equality and bears

alike upon all the property within limits wherein it is lawful to levy for a purpose.[3]

Lehigh and Suncrest being non-pool handlers do not participate in the equalization features of Order 27 by accounting for milk in each class and by settling with the Producer Settlement Fund on their complete utilization of milk. Neither are they required to pay to their producer suppliers the uniform producer prices established by Order 27. Accordingly, when they sell non-pool milk in the marketing area, an equal amount of pool milk of the fully regulated handler is displaced and sold for manufacturing purposes. The fully regulated handler of the displaced pool milk will in these circumstances account to the equalization fund at the lower Class III price for manufacturing uses instead of at the Class I price for fluid milk as he would have done had the non-pool milk not been sold in the marketing area. Since Lehigh and Suncrest do not account to the equalization fund for any milk sold in the marketing area, the fund will, in the absence of the compensatory payment, lose the difference between the Class I and Class III prices. The compensatory payment makes the equalization fund whole. It assures payment of the uniform blended price to producers whose milk is subject to full regulation under the Order and protects the fully regulated handler under the Order from the competition of the unregulated handler outside the Order who would have an advantage if the compensatory payment were not required. Constitutionally the handler totally regulated by the market order would have no protection against this outside competition since the Fourteenth Amendment does not protect a business against the hazards of competition. (*Hegeman Farms Corporation* v. *Baldwin*, 293 U. S. 163, 170.)

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[3] Black's Law Dictionary, 3rd Edition, West Publishing Co. 1933.

The District Court thought outside competition to be real and noticed the intent that the compensatory payments are designed to offset the harmful effect created by it. (R. pp. 215a-216a.)

**II. The provisions of the order requiring compensatory payment are not in conflict with or inconsistent with the uniformity requirement of § 8c(5)(A) of the Agricultural Marketing Agreement Act of 1937, but aid in effectuating its acknowledged purposes.**

We submit that it would be error to conclude that lack of uniformity lies in a comparison of producer returns or producer prices with minimum class prices. Producer prices and class prices may or may not be comparable. Lehigh, being a cooperative association of dairy farmers, will return to its members the highest possible returns from the sale of their milk and will also include earnings from its manufacturing and distribution operations.[4] A handler may, by reason of competition, be willing to pay or be forced to pay a price in excess of the official minimum price, while another dealer in an entirely different competitive situation may be able to buy at the minimum price which then becomes his "producer price" or cost. Even fully regulated handlers encounter differences in "producer prices" because of competitive or other conditions. Costs are variable and depend upon the season, the supply, the efficiency of the handler, the economic condition of the market at a particular time, and the demand for the product. We think that when the draftsman of § 608c(5)(A) was

[4] This operation distorts any comparison between "producer prices" and "minimum prices". In order to make a comparison for purposes of § 608c(5)(A) we should know what class prices are paid by Lehigh and Sunerest in order properly to compare them with the order "minimum prices".

talking of uniform prices payable by handlers in accounting to the pool he was talking about uniform class prices required under a market order, and he was not considering these variable items which go into producer prices and which are beyond the scope of the regulatory plan. Under the orders only the floor, or minimum price, to the producer is the regulated price.[5]

The language of § 608c(5)(A) could not have been intended as a ceiling to prevent a handler from paying premiums for any reason whatever. Nor was it intended as a "loophole" for a handler who, for any reason, might find it expedient to pay a higher price and claim the order to be unconstitutional.

It seems to us that when the draftsman of § 608c(5)(A) was talking about uniformity, he was talking about uniformity of class price because without the uniformity requirement, an order could be rigged (or an administrator could permit) one handler to pay one price for Class I milk and another handler to pay a lesser or greater price for Class I milk. The language prices "uniform to all handlers" prevents discrimination on the class price level.

The provisions of the act are variables applicable to different circumstances.[6] Words of a statute may "have a color and a content that may vary with the setting", (*First National Bank* v. *Beach*, 301 U. S. 435, 440-

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[5] "The immediate object of the act is to fix minimum prices for the sale of milk by producers to handlers. It does not forbid sales at prices above the minimum." *Stark* v. *Wickard*, 321 U. S. 288, 291.

[6] Congress seems to have recognized that the statutory terms are applicable to divergent and mutable situations and that the effectiveness of the provisions depends upon their adaptability to conditions affecting each marketing area and upon their adjustment from time to time to meet changing conditions. (Sen. Rep. No. 565, 75th Cong. 1st Sess. p. 3. H. R. Rep. No. 468, 75th Cong. 1st. Sess. p. 3.)

441) and the general terms of a regulation ought not to be interpreted in "an abstract, sterile way." (*Federal Communications Commission* v. *R. C. A. Communications, Inc.*, 346 U. S. 86, 94.) "An elaborate enactment like this, devised by those who know the needs of the industry and drafted by legislative specialists, is to be treated as an organism. Every part must be related to the scheme as a whole."[7]

Reading the statute as a whole, the Court of Appeals for the Third Circuit concluded that § 8c(5)(A) does not refer to equalizing either fully regulated or partially regulated handlers' costs, nor does it take account of the initial cost of milk to handlers (R. p. 902), and would not impute to Congress a policy in one section which would directly conflict with the overall regulatory understaking (R. p. 903).

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[7] Frankfurter, J. in *Stark* v. *Wickard*, 321 U. S. 288, 311, 315-316, dissenting opinion.

## Conclusion

Finally, we support the government's argument and position and respectfully urge that the judgment of the Court of Appeals, Third Circuit, be affirmed.

Respectfully submitted,

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## APPENDIX A

### Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets.

In order that the policies of cooperation embodied in Section 10 (i) of Public Act, No. 10, 73d Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937, and Section 258-n of Article 21 of the Agricultural and Markets Law, State of New York, may have their fullest possible effect in spirit and in practice, the following principles of procedure are hereby mutually approved as the basis of cooperation in marketing areas in the State of New York in which Federal and State complementary and concurrent orders, rules, or regulations may hereafter be issued.

#### Joint Procedure

It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders regulating the acquisition of milk by handlers and milk dealers who market or in any manner participate in the acquisition, processing, or distribution of milk to be marketed in such marketing areas as may be defined in such complementary and concurrent Federal and State orders, and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the rec-

ord of such hearings, and to maintain a mutual exchange of views conducive to common agreement upon all essential provisions prior to the issuance of either order. The same policy of joint action shall be followed with respect to modifications of or amendments to such orders.

### Uniform Provisions

The Secretary of Agriculture and the Commissioner shall, in their respective complementary and concurrent orders for marketing areas within the State of New York, establish (a) identical classifications of milk to which comparable prices, inclusive of authorized assessments, fees, adjustments, or deductions, shall apply, and (b) identical differentials or other terms or conditions of purchase and acquisition and payment to the extent authorized by the respective Federal and State statutes. In the event any method of payment to producers or associations of producers is prescribed by both orders applicable to the same marketing area, provisions for such method shall be so drawn in the respective Federal and State complementary and concurrent orders that the plan of uniformity for all producers or associations of producers supplying the market will not be altered in any way by the fact that the acquisition of such milk or the payment therefor is deemed to be governed by either order. The contents of any such order issued by the Secretary of Agriculture or by the Commissioner shall be limited to terms, conditions, and prices relative to the acquisition of milk by handlers and milk dealers, and accounting and settlement therefor, and the administration thereof.

*Appendix A*

EXHANGE OF INFORMATION

It shall be the policy of the Secretary of Agriculture and the Commissioner to exchange all information essential to the proper administration of their respective complementary and concurrent orders and relative to transactions within the regulatory jurisdiction of such authorities. The confidential nature of information so exchanged shall be subject to the requirements of Section 10 (i) of Public No. 10, 73d Congress, as amended and reenacted by the Agricultural Marketing Agreement Act of 1937, and, on the part of the Secretary of Agriculture, to the provisions of the Agriculture and Markets Law, State of New York, and in either case subject to such rules and regulations as may be issued under the respective Federal and State statutes.

ADMINISTRATIVE AGENCY

The Secretary of Agriculture and the Commissioner shall utilize one and the same agency for the administration of each respective complementary and concurrent order, which shall be a market administrator who is approved and designated as such by both the Secretary of Agriculture and the Commissioner. The duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Secretary of Agriculture or the Commissioner, during the period of employment, in the administration of any other orders or of the terms or

conditions in any other orders not common to both. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing herein shall be deemed to prevent the Secretary of Agriculture or the Commissioner from designating the same person as the market administrator of complementary and concurrent orders issued for each of two or more marketing areas within the State of New York.

FINANCES

Expenses incurred in the maintenance of the market administrator's office shall be paid by assessments or deductions made and collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to the audit of both Federal and State authorities. Such assessments or deductions shall be identical in rate and shall be made in such a way that uniformity under the Federal and State orders in returns to producers and gross cost to handlers or milk dealers, inclusive of such assessments or deductions as the case may be, shall not be affected by the manner of making the assessment or deduction under the respective orders.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from overhead incurred by the Federal or State governments in the administration, supervision, and enforcement of such orders.

## *Appendix A*

### Administration

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. It is also understood that whatever periodical reports are required to be made by the market administrator to the respective central offices of the Federal and State governments, shall be uniform. Likewise the books, records, and accounts of the market administrator shall be open for inspection and audit to both the Secretary of Agriculture and the Commissioner.

### Enforcement

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto so that a cooperative effort may be made to decide upon a proper course of action. In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Commissioner will undertake, both severally and jointly, to utilize all means at their disposal for the effective enforcement of such orders.

*Appendix A*

INTERSTATE COOPERATION

In recognition of a common interest in the regulation of marketing conditions on the part of duly constituted authorities of the State in which the marketing areas are located and those of the States from which substantial quantities of milk flow to such marketing areas, and with a view to encouraging coordination of effort in the regulation thereof, the Secretary of Agriculture and the Commissioner will follow the policy of inviting consultation with such authorities from time to time in matters of mutual interest arising in connection with the formulation, modification, or administration of complementary and concurrent orders applicable to marketing areas within the State of New York.

Signed this 26th day of August 1938.

HOLTON V. NOYES,
*Commissioner of Agriculture and Markets,*
*State of New York.*

/s/ H. A. WALLACE,
*Secretary of Agriculture.*

## APPENDIX B

### Order and Announcement of Commissioner of Agriculture and Markets Announcing the Adoption of Official Order No. 126 Regulating the Handling of Milk to be Sold in the New York Metropolitan Milk-Marketing Area.

WHEREAS, the Commissioner of Agriculture and Markets does hereby find that the adoption of Official Order No. 126 to regulate the handling of milk to be sold in the New York Metropolitan Milk-Marketing Area, a copy of which order is annexed hereto and made a part hereof, is approved or favored by over seventy-five per centum of the producers of milk produced in the production area for such marketing area as evidenced by a referendum conducted by the undersigned Commissioner concurrently with a referendum conducted by the Secretary of Agriculture of the United States on his Order No. 27 which is similar and complementary to Official Order No. 126, and

WHEREAS, the undersigned Commissioner of Agriculture and Markets does hereby find from testimony given at a hearing held jointly by the Secretary of Agriculture of the United States and by the undersigned Commissioner for the purpose of considering such similar and complementary orders and from information concerning conditions existing in the milk industry in the New York Metropolitan Milk-Marketing Area that conditions exist in such area which so affect the orderly marketing of milk in such area that public interest requires that the public policy declared in Section 258-k of the Agriculture and Markets Law shall be effective, and

WHEREAS, the Secretary of Agriculture of the United States has determined to promulgate and make effective his

*Appendix B*

Order No. 27 regulating the handling of milk in the aforesaid New York Metropolitan Milk-Marketing Area;

Now, THEREFORE, I, Holton V. Noyes, the Commissioner of Agriculture and Markets in the State of New York, pursuant to the terms and provisions of the Agriculture and Markets Law, as amended, and in accordance with the power and authority in me vested, do hereby adopt and promulgate Official Order No. 126, said order to become effective concurrently with and to be complementary to such similar Order No. 27 to be made effective by the Secretary of Agriculture of the United States.

Said Official Order No. 126 shall be effective on and after 12:01 a.m., e.s.t., September 1, 1938, and I do hereby order that from such date the handling of milk produced for sale in the New York Metropolitan Milk-Marketing Area shall be in conformity to and in compliance with the terms and conditions in said Official Order No. 126.

In addition I do hereby announce that the average of the prices reported daily during the sixty days preceding the 25th day of August, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market was 26.18 cents and that the average of the prices reported daily during the thirty days preceding the 25th day of August, by the United States Department of Agriculture, for 92-score butter at wholesale in the New York market was 26.25 cents; and hereby order that the Class I price pursuant to Article IV of said order, for the month of September, shall be $2.45 per hundredweight, and that the Class II-A price pursuant to Article IV of said

order for the month of September, shall be $1.75 per hundredweight.

IN WITNESS WHEREOF, I have hereto set my hand and the official seal of the Department of Agriculture and Markets of the State of New York, this 25th day of August, 1938.

[SEAL]

HOLTON V. NOYES,
*Commissioner of Agriculture and Markets.*

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## APPENDIX C

### Compensatory Payment Provision of New York State Official Order No. 126

**Sec. 927.83 Payments on milk received from dairy farmers at nonpool plants.** Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: **Provided**, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

**(a)** Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

*Appendix C*

**(1)** It was derived from milk received at a nonpool plant from dairy farmers or is received at a plant from which milk specified in Sec. 927.65 (h) (2) or (3) was received from the handler's own farm.

**(2)** It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

**(3)** The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

**(b)** The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

**(1)** If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this subpart: **Provided**, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant.

**(2)** If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the difference between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: **Provided**, That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

**(3)** If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk

equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b) (9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: **Provided,** That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

**(4)** For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

**(5)** In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

**(c)** Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: **Provided**, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

**(1)** By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

**(2)** By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

**(3)** By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

**(d)** The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

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# Supreme Court of the United States.

OCTOBER TERM, 1961.

No. 79.

LEHIGH VALLEY COOPERATIVE FARMS, INC., AND SUNCREST FARMS, INC.,

*v.*

UNITED STATES ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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## BRIEF FOR THE STATES OF VERMONT AND CONNECTICUT, AMICI CURIAE.

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LEHIGH VALLEY COOPERATIVE FARMS, INC., AND SUNCREST FARMS, INC.,

*v.*

UNITED STATES ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## BRIEF FOR THE STATES OF VERMONT AND CONNECTICUT, AMICI CURIAE.

This brief on behalf of the States of Vermont and Connecticut is being filed pursuant to the provisions of Rule 42, paragraph 4, in support of the position of the respondents.

### Opinions Below.

The opinion of the United States Court of Appeals is reported in 287 F. 2d 726; the opinion of the District Court is reported in 183 F. Supp. 80.

The decision of the Judicial Officer of the United States Department of Agriculture, case of *In re Lehigh Valley Cooperative Farms, Inc.*, is reported at 18 Agr. Dec. 75, and the case of *In re Suncrest Farms, Inc.*, is reported at 18 Agr. Dec. 191.

## Statute and Order.

The statute involved is the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, 7 U.S.C. § 601 *et seq.*), which re-enacted with amendments the marketing provisions of the Agricultural Adjustment Act of 1933 (48 Stat. 31) as amended. The declared policy of the Act is to establish and maintain such orderly marketing conditions for milk and certain other agricultural commodities as will establish prices to farmers which are parity prices as defined in the Act. Whenever the prices thus determined for a marketing area are unreasonable with respect to milk in view of the various economic factors which affect market supply and demand for milk and its products in the marketing area, the Act directs the fixing of such prices as will reflect these economic factors, insure a sufficient supply of pure and wholesome milk, and be in the public interest (7 U.S.C. § 608c (18)).

The Act provides for regional milk orders (7 U.S.C. § 608c (11)). The Act provides the procedure and conditions incident to the issuance of an order or an amendment to an order. The provisions which a milk order may contain are set forth in section 608c (5), 608c (7) and 610 (b) (2) (i). In addition to the statutory authority in section 8c (5) of the Act for classification, pooling and pricing of milk, auxiliary provisions may be included in an order (§ 608c (7) (D)) of the Act where such provisions are incidental to and not inconsistent with the terms and provisions specifically provided in subsections (5) and (7) of the Act and necessary to effectuate the other provisions of an order. The relevant provisions of the Act are set forth below:

Section 8c (5) of said Act, captioned "Milk and its products; terms and conditions of orders," provides in pertinent part as follows:

"In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

"(B) Providing:

. . . . . .

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered . . ."

Section 608c (7) of the Act provides:

"In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

. . . . . .

"(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)—(7)

of this section and necessary to effectuate the other provisions of such order."

The order involved is milk marketing Order No. 27, as amended (7 C.F.R. 927.1 *et seq.*), with particular reference to section 927.83, said section being the compensatory payment provision of said Order No. 27.

## Question Presented.

The Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 as amended has issued an order regulating the handling of milk in the New York–New Jersey milk marketing area, order No. 27 (7 C.F.R. 927.1 *et seq.*). The question is whether the Secretary has statutory authority to provide in his order that an out of market handler who under the order is not subject to full regulation must pay a "compensatory payment" on limited sales made in the marketing area to offset the loss occasioned in the fluid milk sales of the producers regularly supplying the market and so recognized in the order, and, further, whether the appropriate measure of the rate of the "compensatory payment" is the difference between the fluid (class I A) and manufactured (class III) milk prices under the order inasmuch as the displacement forces the regular producer's milk out of the higher class I A into the lower class III price category.

## Statement of Interest.

Milk producers in the State of Vermont market their milk in several markets which are regulated by federal

milk marketing orders containing "compensatory payment" provisions comparable to those in issue in the instant case.

A number of these milk producers market their milk in the New York–New Jersey marketing area under the provisions of order No. 27 (7 C.F.R. 927.1 *et seq.*), here in issue. Others market their milk in the Greater Boston milk marketing area under the provisions of order No. 4 (7 C.F.R. 904.1 *et seq.*); Springfield marketing area order No. 36 (7 C.F.R. 996.1 *et seq.*);[1] Worcester marketing area order No. 99 (7 C.F.R. 999.1 *et seq.*); Southeastern New England marketing area order No. 90 (7 C.F.R. 990.1 *et seq.*); and Connecticut marketing area order No. 119 (7 C.F.R. 1019.1 *et seq.*).

According to "Milk—Farm Production, Disposition, and Income," issued by the Crop Reporting Board of the Agricultural Marketing Service of the United States Department of Agriculture for the period 1959-1960, the total quantity of milk sold by milk producers in Vermont to plants and dealers in 1960 was 1,830,000,000 pounds, having a cash value of $90,951,000. The number of cows on farms in 1960 in Vermont was 258,000. The production and marketing of milk in the State of Vermont is a very substantial industry, one of the most important in the State.

Milk producers in the State of Connecticut market their milk in several markets which are regulated by federal milk marketing orders containing "compensatory payment" provisions.

The greater part of their milk is marketed in the Connecticut marketing area under order No. 119 (7 C.F.R. 1019.1 *et seq.*): see section 1019.46 for "compensatory payment" provisions.

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[1] The "compensatory payment" provisions of the Springfield, Massachusetts, milk order are involved in the case of *Knudsen Bros. Dairy, Inc.*, v. *Benson*, presently awaiting decision in the United States Court of Appeals for the Second Circuit.

They also market milk in the New York–New Jersey marketing area under the provisions of order No. 27, the "compensatory payment" provisions of which are in issue in this proceeding, and in the Springfield, Massachusetts, marketing area under the provisions of order No. 96 (7 C.F.R. 996.1 *et seq.*), and the southeastern New England marketing area under the provisions of order No. 90 (7 C.F.R. 990.1 *et seq.*), both of which latter orders have "compensatory payment" provisions similar to those involved in the instant proceedings.

During the year 1960 the total quantity of milk sold by milk producers in Connecticut to plants and dealers was 665,000,000 pounds, for which the milk producers received $38,404,000. The number of cows on farms in Connecticut in 1960 was 89,000.[2]

## Statement.

The statement of the case set forth in the brief filed on behalf of the respondents is adopted for the purposes of this brief. It is the purpose of the proponents of this brief to limit the discussion and argument to the question of whether the "compensatory payment" provisions of order No. 27 as amended, issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 as amended, are authorized by the Act and valid and therefore binding upon the petitioners.

This brief is submitted by and on behalf of the States of Vermont and Connecticut in support of the position of the respondents.

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[2] "MILK—Farm Production, Disposition and Income, 1959-1960," published by the Crop Reporting Board of the Agricultural Marketing Service of the United States Department of Agriculture.

## Argument.

### I. The Provisions for Compensatory Payment in the Order are Not Inconsistent with the Requirements of Section 608c (5) (A) of the Act.

Order No. 27, here involved, was designed to meet the difficult and complicated production and marketing conditions peculiar to the New York–New Jersey marketing area pursuant to the provisions of section 608c (11) (C) of the Act. Section 608c (5) of the Act sets forth the terms and conditions which may be contained in an order issued by the Secretary of Agriculture regulating the marketing of milk. The principal provisions, insofar as they are applicable to the order in this proceeding, pertain to the classification, minimum pricing and pooling of producer milk.

The order provides for a marketwide pool and marketwide equalization of producer returns (7 C.F.R. 927.65-927.82). The producer received a uniform or blended price based upon the total value of all milk used by all handlers who receive milk from "producers" under the order. The method employed in the computation of the uniform blended price is set forth in *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A. D.C.), cert. den. 350 U.S. 1015, as follows:

> "The market administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the minimum class price set forth in the order and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions. ***** The result is divided by the total quantity of milk that is priced under the Regulatory Program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk.

"Each handler whose own total use value of milk for a particular delivery period, i.e., a calendar month, is greater than his total payments at the uniform price, is required to pay the differen e into an equalization or producers' settlement fund. Each handler whose own total use value of milk is less than his total payments to producers at the uniform price is entitled to withdraw the amount of the difference from the equalization or producers' settlement fund. Thus a composite or uniform price is effectuated by means of the equalization or producer settlement fund."

Wide discretion is vested in the Secretary to provide, on the evidence adduced at the public hearing, regulatory provisions that are necessary in order to attain the legislative goal. The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and the policy are peculiarly matters for administrative competence. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 613-614.

It has been necessary in numerous instances to define producers as distinguished from dairy farmers who are not producers and to regulate in different ways the milk from the two groups. Such differences and distinctions are necessary in order to define and determine thereafter milk to be included in the computation of the blended price and the milk subject to full regulation. Latitude is conferred by the Act to include or exclude milk in the operation of the equalization pool. *Green Valley Creamery* v. *United States*, 108 F. 2d 342, 345.

It has also been held that the classification, pricing and pooling provisions in section 8c (5) (A) and section 8c (5) (B) of the Act are to be given a practical regulatory significance in relation to handlers and processors, and the

effect of their mode of doing business upon the marketing problem, and milk from outside a regular source of supply, that is, fully regulated by an order, may be regulated in a different way by the order. *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 92-94, cert. den. 329 U.S. 788.

The petitioners in this case are non-pool handlers. The order imposes no obligation or requirement on non-pool handlers with respect to the payment of a minimum price for the milk received from "dairy farmers" at "non-pool plants." There is no violation of section 608c (5) (A) of the Act for the payment of a uniform price for milk purchased from producers or associations of producers. They are free to negotiate with the farmer supplying them with milk as they see fit. The petitioners present no issue under section 8c (5) (B) (ii). If this section of the Act were applicable to petitioners, they would be subject to full instead of partial regulation.

In order to accomplish the computations which must be made to determine the uniform blended price it is necessary to ascertain the milk to be included in the computation. The order, therefore, sets forth definitions.

As defined in the order a "producer" means any dairy farmer where milk is delivered from his farm to a "pool plant," with certain exceptions not here material (7 C.F.R. 927.6).

The term "dairy farmer" is defined in the order as any person who produces milk (7 C.F.R. 927.5), but the minimum price provisions of the order are by these terms not applicable with respect to the milk of "dairy farmers." It is only with respect to the milk of "producers" as thus defined that the handler is required to account to the pool at the minimum price established by the order. There is no requirement in the order that the handler pay a minimum price for milk received from "dairy farmers" who are not "producers."

The order distinguishes between (1) a handler of milk received from "producers" at a "pool plant" and (2) a handler of milk received from "dairy farmers" at a "non-pool plant." The handler is free to make any settlement which he may elect to make with the dairy farmers for the milk received from them at "non-pool plants."

II. Section 608c (7) (D) Vests in the Secretary of Agriculture the Authority to Prescribe the Compensatory Payment Provisions of the Federal Order.

The Act provides in section 608c (7) (D) that a milk market order shall include terms and conditions "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)—(7) of this section and necessary to effectuate the other provisions of such order."

One of the difficult problems which confronts the Secretary in determining the extent of any regulation which he will issue, and the terms and provisions thereof, pertains to the application of the regulation to those handlers who distribute a small percentage of their milk in the regulated market area and to the handler who only occasionally sells a portion of his milk in the regulated market. This problem has confronted the Secretary in practically every market where a milk regulation order has been issued and made applicable by the Secretary.

The regulation which governs the marketing of milk in a designated marketing area must be clear and specific in order to delineate with particularity the area and the milk subject to the regulation. The order is made applicable to a particular marketing area. Not only must the area be defined and, as changing conditions require, redefined, but the standards to define the plants which regularly supply the milk to the marketing area must be set forth with particularity. Thus the terms "pool plant," "pool milk,"

"producer" and "outside milk" have been used in the order to provide particularity of the order application to certain milk which is to be fully priced and regulated. This is necessary so that the full impact of the regulation which is suited to the particular problems of the specific marketing area to be regulated will be applied to milk reasonably identifiable within the marketing area to be regulated and not to milk principally associated in some other marketing area with different marketing problems.

These plants, which in the main regularly supply milk to the marketing area, are designated "pool plants" where milk is received from "producers." Whenever the boundary lines of the marketing area are drawn there would always be some fringe sales, either by regulated handlers to customers outside the designated marketing area or by handlers whose principal business is outside the area to customers within the marketing area as defined. Thus the matter of "peripheral sales" and the matter of dealing therewith in relation to the order were presented.

Since 1945 the Secretary has included in marketing orders issued by him regulating the marketing of milk provisions substantially the same as the compensatory payment provisions of order No. 27 here in issue.

When order No. 27 was originally issued, effective September 1, 1938, it contained a provision pertaining to "unpriced milk." This provision was challenged in *United States* v. *Rock Royal Co-Operative, Inc.*, 307 U.S. 533. The majority of the Court upheld this provision although it clearly pointed out that certain milk was fully regulated while the "unpriced milk" was only partially regulated. After public hearing in 1940 order No. 27 was amended so that all milk received at a plant approved by any health authority as a source of milk for the marketing area would be pooled and so priced that handlers would not have an advantage created by the order to disrupt the orderly market-

ing of producer milk. This provision was sustained in *Titusville Dairy Products Co.* v. *Brannan* (C.A. 3, 1949), 176 F. 2d 332, cert. den. 338 U.S. 905. In that case the authority to extend milk regulation to all receipts of milk by a handler, even though no milk was disposed of in the regulated marketing area, was sustained when the milk was eligible for disposition under health regulations.

Following hearings, and as a result of the experience, the order was again amended in 1945 to provide a pool plant system. Under this system milk delivered to a plant which shipped, or which had the ability and willingness to ship, fluid milk into the marketing area was fully regulated under the provisions of the order. These plants were designated as "pool plants" and the milk was designated as "pool milk." Under this program milk from "non-pool plants" was permitted to be sold in the marketing area under the condition that a "compensatory payment" be made with respect to it (7 C.F.R. 1945 Sup. 927.8 (e), 927.9 (h)). This provision was held invalid in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), cert. den. 344 U.S. 891.

Discussion with respect to the *Kass* case and differentiation between the present case and the *Kass* case will be made later in this brief on page 22.

Following decision in the *Kass* case and as a result of extended hearings in 1953, extensive findings and conclusions were made by the Secretary and new "compensatory payment" provisions were promulgated (18 F.R. 8444 *et seq.*). On the basis of evidence adduced at the hearing on the 1953 amendments the Secretary found that—

> "When provision is made for marketwide equalization of payments to producers it is essential that the benefits of such equalization accrue only to those farmers who are engaged in the production of a supply of milk which is primarily produced for and always

available for use when needed in the marketing area. Otherwise, the money paid by consumers for fluid milk would in part be distributed among farmers delivering milk to plants which do not constitute a part of the regular and dependable supply of milk for the market. Such distribution of the returns from the sale of milk in the marketing area would not be in the best interest of either consumers or producers since the money which is intended to provide producers with an incentive to produce an adequate and dependable supply of pure and wholesome milk for the marketing area would be dissipated through distribution to farmers only incidentally engaged in the business of supplying marketing area with milk." 18 F.R. 8444, 8447.

Further, it was found that—

"Non-pool milk which originates at a plant not subject to a market-wide equalization pooling plan has a substantial advantage over pool milk in addition to the price advantage. The handler who receives pool milk from producers and uses or sells it for Class I-A purposes is charged the Class I-A price but is not permitted to pay that full price to his own producers. Instead he must pay a substantial part of it into the equalization fund [*i.e.* producer-settlement fund] under the order for distribution through the pool to all pool producers. A non-pool plant operator is not so burdened and limited for he can pay his own farmers the full Class I-A price or any part of it as he believes necessary to retain his supply of milk or outbid pool plant competitors for milk. Unless this condition is dealt with, the non-pool dealer can always outbid a similarly located pool plant competitor for milk sup-

plies without cost to himself. The pool plant competitor obviously cannot afford to pay his own producers the full Class I-A price and also pay equalization to the pool on the same milk. . . .

"It is concluded that provisions in the order for imposing such a charge (compensation payments) on nonpool milk are not only incidental to the provisions establishing class prices and market-wide equalization but are necessary to effectuate such provisions, and are not inconsistent with the terms and conditions specified in Section 8c (5) and 8c (7) of the Act. It is further concluded that the rates of payment herein specified are those which are necessary and appropriate to accomplish the purpose indicated." 18 F.R. 8444, 8445, 8446, 8448.

In 1957 extended hearings were held on the amending of order No. 27 to consider extending the marketing area to Northern New Jersey and upper New York State. As a result of such hearings, and based upon evidence therein, amendments to the order were issued effective as of August 1, 1957 (22 F.R. 4643). The order as amended continued in effect the requirements for compensatory payments. The provisions, findings and conclusions were in all respects retained in the issuance of the 1957 amended order (22 F.R. 4221-4222). These provisions of the 1957 amended order for compensatory payments are involved in this litigation, and the relevant sections of the 1957 amended order are part of the record (R. 879(a), 884(a)).

The Secretary made extensive findings on the basis of the hearings on the 1957 amendments (22 F.R. 4194, 4207-4208). In essence he found that compensatory payments were designed to bring substantial equity between the handler and the producer of pool milk and the handler and

producer of non-pool milk with respect to sales in the marketing area.

The compensatory payment provisions of the order are necessary to insure against displacement of pool milk by milk which is not accounted for to the equalization fund. When the non-pool handler sells fluid milk in the marketing area in times of surplus, he displaces an equal quantity of pool milk which would have been accounted for to the equalization fund at the class I fluid price. As a result of the displacement, the pool milk is sold as surplus milk and is accounted for in the equalization fund at the class III manufacturing price. Absent the compensatory payment provisions of the order, the pool producers will stand to lose because of a reduction in the uniform blended price and the non-pool handler stands to gain because he is not accountable to the equalization fund for any of his milk and may retain the difference between the class I and the class III price. The difference will either add to the non-pool handler's profit or it may be used by him in the procurement of milk from pool producers at the expense of pool handlers. The compensatory payments are thus essential to preserve uniformity of pricing under the classified pricing program of the order and the integrity of the equalization fund. If intermittent supplies or peripheral supplies are not to be subjected to the full regulation of the order, there is no choice as to what type of provision can be used for this purpose, since minimum class prices may not be set under the order for handlers who do not participate in the marketwide equalization.

The Sub-Committee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Congress, First Session, held hearings in connection with and study of the dairy industry after decision in the *Kass* case. At that time there were a number of milk orders issued by the Secretary of Agriculture under the authority granted

him by the Agricultural Marketing Act which contained a compensatory payment provision. A number of milk orders which contained such provisions came to the attention of the sub-committee in the course of the hearings. No legislative action was suggested or proposed to prohibit or discourage the use of provisions for compensatory payment as a result of these hearings. The administrative practice of utilizing compensatory payments in milk orders had long been continued.

It is respectfully submitted that, if the Congress had been adverse to the administrative regulation, it had reasonable opportunity to take action to rescind or repeal such legislation, or to enact legislation to prevent the use of such provisions in milk orders. It is submitted that this failure on the part of Congress to act is some evidence of Congress's approval of the administrative interpretation and entitled to great weight. *Leycock* v. *Kenney*, 270 F. 2d 580, 587-589 (C.A. 9, 1959). *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956).

The Secretary is given broad discretion in administering the order program under the Agricultural Marketing Agreement Act of 1937. *Queensboro Farm Products* v. *Wickard*, 137 F. 2d 169. The terms of the orders issued pursuant to the Act are largely matters of administrative discretion, and technical details of the milk business are left to the Secretary and his aides. *Stark* v. *Wickard*, 321 U.S. 288, 310.

The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and the policy are peculiarly matters of administrative discretion. *Secretary of Agriculture* v. *Central Roig Refining Co.*, 338 U.S. 604, 613-614.

Recognizing that varying conditions in different markets may require different approaches to a similar problem, the

St. Louis market, in its approach to the compensatory payment problem, adopted a provision providing for allocation. This approach, and the provision in that order, were approved in *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87 (8th Cir.), cert. den. 329 U.S. 788 (1946):

> "It is to be borne in mind that the classification requirement in 7 U. S. C. A. Section 608c (5) (A) has reference to producers' milk, so that the question under this provision is merely whether the allocation formula compels a handler to pay for producers' milk . . ." (P. 94.)
>
> "The handlers insist that proration is the only proper and just method of allocation, but they, of course, are looking at their own position as much as that of producers, while the statute looks primarily at that of producers." (P. 94.)
>
> "The Supreme Court has refused to read other language in 7 U. S. C. A. Section 608c (5) (A) in a literal significance which would defeat the regulatory purpose of the Act, when it held in United States v. Rock Royal Co-Operative, 307 U. S. 533, 578-580, 59 S. Ct. 993, 1016, 83 L. Ed. 1446, that an 'agency' cooperative was subject to the Agricultural Marketing Agreement Act, even though it had not technically 'purchased' the milk of its producers . . ." (P. 95.)
>
> "And, finally, in hospitable approach to the question of statutory construction, it should be observed that if allocation of highest-class utilization to producers' milk as against outside milk is not permissible as a use classification for price purposes under 7 U. S. C. A. Section 608c (5) (A) then a handler could by segregation and use of his outside milk in Class I completely frustrate the regulatory purpose of the statute." (Page 95.)

The District Court in its opinion in this case states:

> "By a plan of full regulation of those who regularly supply the Order No. 27 (i.e., the New York–New Jersey Milk Marketing Order) area, based upon a market-wide pool, the Secretary has distributed the burden of surplus milk and its resulting decreased return in the form of milk products, upon all of the fully regulated handlers and their suppliers. So long as there is a reasonably high percentage of fluid milk sales and a corresponding reasonably low percentage of nonfluid sales (whatever those relative proportions might be for a healthy market) the return to the farmers will be adequate. Sales of fluid milk in the area by nonregulated handlers posed a fundamental threat to this adequate amount of return. If unchecked, they could seriously disrupt the whole regulatory plan. The Compensatory Payment provisions (which provisions appear in varying form in almost all of the government's milk regulating orders) are calculated to check or greatly minimize this threat. Thus they are calculated to carry into effect Order No. 27 and are authorized by the Act as 'incidental' and 'necessary' to carry out its terms, 608c (7) (D)." (183 F. Supp. 80, 90-91.)

The District Court ruled that the compensatory payment provisions of order No. 27 were inconsistent with the uniform price provisions of the Act and accordingly were invalid. Reaching this conclusion that Court relied on *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), cert. den. 344 U.S. 891.

On review the Court of Appeals reversed the judgment of the District Court and found that the compensatory payment provisions of order No. 27 are valid and not inconsistent with section 608c (5) (A) of the Act.

"Section 8c (5) (A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c (5) (A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, this accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c (5) (A). Stark v. Wickard, 321 U. S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F. Supp. 66, 73 (N. D. Ohio 1960).

"Moreover to imply the thought urged by Lehigh and Sunerest as the motivation behind Section 8c (5) (A) and thereby measure the compensatory payment by using the Kass formula of equalized actual costs, would be repugnant to the express purpose set forth in the Act itself, i.e., regional regulations to secure a stable market and parity prices for producers. To illustrate: If a non-pool handler's initial cost was the Class I (fluid milk) price, he could, under the principle of the Kass case, distribute milk in the marketing area in any volume without accounting to the Producers Settlement Fund or making a compensatory payment. If his initial cost was greater than the Class I (fluid milk) price, the same result would occur. If his initial cost was slightly less, his compensatory payment would be a token one.

"It is evident that in all three illustrations, employment of the Kass theory to measure compensatory payments would impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of the Class I fluid milk utilization in the marketing area. In contradistinction, the payments provided for in Order No. 27, complement the regional marketing idea. They are designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Sunerest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress.

"We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c (5) (A), has no application to non-pool handlers. Lehigh and Sunerest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c (5) (A) which states: 'Such price shall be uniform as to all handlers,' guarantees them a cost equal to that of pool handlers. But there is not the slightest indication that Congress used the language of Section 8c (5) (A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan." *United States* v. *Lehigh Valley Co-operative Farmers, Inc.*, 287 F. 2d 726.

Similar compensatory payment provisions were considered in *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio, 1960), on appeal to the United States Court of Appeals for the Sixth Circuit. In upholding the validity of the compensatory payment provisions of the Cleveland

milk order under circumstances similar to those present here, the District Court held (72-73):

> "Fluid milk sold in the regulated area by non-pool handlers displaces fluid milk sales that otherwise would have been made by pool handlers, causing the latter to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The prospect of such results constituted a real threat to the integrity of the basic regulatory plan. At the outset of the promulgation hearing it was considered that all handlers who sold any milk in the Cleveland area should be fully regulated. The proposed order that accompanied the notice of the promulgation hearing so provided. Full regulation under similar circumstances has received judicial approval, Titusville Dairy Products Co. v. Brannan, 3rd Circuit, 176 F. 2d 332 Cf. United States v. Rock Royal Cooperative, Inc. supra. At the hearings, however, it was shown that full regulation of such non-pool handlers would subject them to an unwarranted burden of payments and assessments and place them at a severe competitive disadvantage with other non-pool handlers in the sale of milk in non-regulated areas. Accordingly, it was determined that the alternative of partial regulation of non-pool handlers who distributed 10% or less of their milk in the regulated area would subserve the purpose of protecting the basic plan of regulation and be equitable to such non-pool handlers. Such alternative was incorporated in Section 975.72 (A) of Order No. 75. The provisions of this section of the Order are not inconsistent with subsections (5)-(7) of 608c of the Act and being designed to preserve the integrity of the basic plan they must be regarded as incidental and necessary 'to effectuate the other provisions of the

> Order'. It should be noted that in Kass v. Brannan the alternative of full regulation was not present. Kass purchased milk products from another handler. He made no purchases of milk from farmers who could have been brought within the ambit of full regulation under Order 27 as producers."

It is not the purpose of compensatory payments to equalize the cost between handlers who are fully regulated under the order and those handlers who are only partially regulated. In fact, there is no authority under the Act to equalize such costs even between handlers who are fully regulated. The authority of the Secretary under section 608c (5) (A) is to establish minimum prices for the various classes of milk in the pool on the basis of which fully regulated handlers must account to the equalization fund. As previously pointed out, a handler does not pay the producer on the basis of minimum prices established pursuant to section 608c (5) (A), but rather on the basis of the uniform blended price under section 608c (5) (B).

Partially regulated handlers such as the petitioners are not subject to the minimum pricing provisions of the order, nor are they required to pay the uniform blended price to their producers. The amount a partially regulated handler pays for his non-pool milk is entirely a matter of negotiation between him and the farmers supplying such milk. Since handlers' costs are not in any way subject to regulation under the order, it follows that compensatory payments are in no way related to such costs.

## III. The Case of Kass v. Brannan, 196 F. 2d 791, Cert. Den. 344 U.S. 891, is Not Controlling.

The factual situation in the *Kass* case is markedly different from the situation in the instant case. The conclusions

reached by the majority of the Court in the *Kass* case, based upon its individual facts, are not controlling and are distinguishable from the situation in the instant case. The disputed charge in the *Kass* case was made on cream and condensed milk purchased by a distributor within the New York marketing area from a non-pool plant in Ohio. The Ohio plant was not approved by any marketing area health authority as a source for fluid milk or fluid cream for the marketing area. If the cream and condensed milk moved directly from the Ohio plant to the consumers, or if the Kass plant had not been located at the marketing area, it would not have been subject to the provisions of the order. The Kass plant at that time received no milk from producers.

In the instant case the disputed charge is made on fluid milk received by the petitioners from dairy farmers and sold directly by the petitioners to the consumers in the marketing area. In deciding the *Kass* case the Court attempted to compare the price paid, or probably paid, by the marketing area distributor (Kass) for cream and condensed milk to the operator in the interhandler sale with the minimum class prices at which a handler must account for raw milk as fixed by the order pursuant to section 8c (5) (A) of the Act.

On the basis of this comparison the Court concluded that the rate of such compensatory payment was not a proper rate, and therefore was not in accordance with law. The Court did not appreciate that section 8c (5) of the Act applies only to milk received by a handler from producers or associations of producers. *Bailey Farm Dairy Co.* v. *Anderson*, 157 F. 2d 87, 94.

In the *Kass* case the Court did not say that a compensatory payment provision was unlawful *per se*, or that any charge on non-pool milk is unlawful. The entire basis for holding the payment unlawful was the lack of evidence in the record to support the rate on cream and condensed

milk moving from a non-pool plant in Ohio to a plant within the marketing area.

In the instant case the evidence in the administrative hearings amply supports the findings of the Secretary with respect to the necessity for and the rate of the compensatory payments provided in the order (R. 752a-755a; 22 F.R. 4194, 4207-4208). The sole ground upon which the District Court ruled against the validity of the contested provisions of the order was that such provisions were in conflict with section 8c (5) (A). This conclusion was reached by the District Court in reliance on the *Kass* case, 183 F. Supp. 80. The opinion of the Court in the *Kass* case seems to rest upon the principle that the purpose of the compensatory payment is the equalization of costs between regulated and non-regulated handlers. We respectfully submit that section 8c (5) (A) of the Act makes no reference to equalization of handlers' costs. It provides simply for uniform minimum class prices for which the pool handlers must account to the Producer Settlement Fund. This was recognized by the Court of Appeals in the instant case, which rejected the reasoning of the *Kass* case in its opinion sustaining the validity of the compensatory payment provisions of the order here in issue.

Section 8c (5) (A) of the Act does not prevent a handler from paying a premium to producers for milk over and above the uniform blended price. His accountability, however, to the Producer Settlement Fund is measured by the minimum prices fixed by the marketing order under section 8c (5) (A). *Stark* v. *Wickard*, 321 U.S. 288, 303. If a handler pays more than the minimum prices at his pool plant, and another handler does not, their costs of milk will be different. The handler who pays premiums to his own producers is not relieved of paying an equivalent amount to the pool. His pool contribution remains due as a matter of mandatory minimum pricing.

Neither fully regulated nor partially regulated handlers' initial costs are involved in the account and payment to the Equalization Fund.

## Conclusion.

In view of the foregoing it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

**No. 79**

LEHIGH VALLEY COOPERATIVE FARMERS, INC., *et al.*,

*Petitioners,*

*v.*

UNITED STATES OF AMERICA, *et al.*,

*Respondents.*

## BRIEF OF FLOYD R. HOFFMAN, DIRECTOR OF THE OFFICE OF MILK INDUSTRY, DEPARTMENT OF AGRICULTURE OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*

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## BRIEF OF FLOYD R. HOFFMAN, DIRECTOR OF THE OFFICE OF MILK INDUSTRY, DEPARTMENT OF AGRICULTURE OF THE STATE OF NEW JERSEY, *AMICUS CURIAE*

### Statement of the Case

(This supplements the Statement in the Government's brief.)

The Director of the Office of Milk Industry of the State of New Jersey and The State of New Jersey have three grounds of interest in this case.

The first is their responsibility for the economic well-being of the members of the milk industry in New Jersey. In July 1961 2,488 producers in New Jersey sold milk to 74 handlers licensed as dealers by New Jersey and regulated

by Order 27. The July 1961 production of New Jersey producers who shipped milk to New Jersey handlers regulated by Order 27 was 78,183,358 pounds. Approximately 106,000 cows in New Jersey in July 1961 produced milk which was shipped to New Jersey handlers regulated by Order 27. Other cows and producers in New Jersey are engaged in the production of milk sold to out of state handlers also subject to regulation by Order 27. The compensatory payment provisions of Order 27 help to assure to the members of the New Jersey milk industry the enjoyment of their fair share of the higher fluid use value.

The second ground of interest is to assure an adequate supply of wholesome milk to the consumers in New Jersey. The compensatory payment provisions of Order 27 afford protection against an unfair burden of disposition of surplus milk to all members of the milk industry supplying the New York Marketing Area which includes northern New Jersey. In the New Jersey portion of the area resides a very large proportion of the total population of the State of New Jersey. Since consumption in this area greatly exceeds production in this area, the area depends for its supply not only on New Jersey producers, but on other members of the milk industry in the New York milkshed. Therefore, the wellbeing of all the members of the industry in the milkshed is essential to assure an adequate supply of wholsome milk to the consumers in northern New Jersey.

The third ground of interest of the Director of the Office of Milk Industry of New Jersey and of the State of New Jersey in this case is that Order 27, the order of the United States Secretary of Agriculture that is under attack, is concurrent with an order of the Director of the Office of Milk Industry of New Jersey. Both of these orders, and a concurrent order of the Commissioner of Markets of the State of New York are jointly administered by a single

market administrator. The history and validity of the federal and state legislation providing for this concurrent regulation will be discussed in the succeeding paragraphs of this Statement. Since this discussion brings out the purpose of the federal legislation authorizing the market order under attack, it is significant to a determination of the merits of the case.

In 1933 depressed economic conditions created a situation in the milk industry that threatened not only the well-being of the producers of milk but was so serious that it threatened the adequacy of the supply to the consuming public of this necessary and inexpensive food. N.Y.L. 1933 c. 158 §1, adding §300 to the Agriculture and Markets Law; N.J.L. 1933 c. 169, Preamble. The physical and economic facts peculiar to the milk industry in the New York metropolitan area have been frequently discussed by this court. See for example *United States* v. *Rock Royal Co-op*, 307 U. S. 533 (1939); *Nebbia* v. *New York*, 291 U. S. 502 (1934). They may be summarized as follows. Because milk intended for use in beverage form ("fluid milk") is highly perishable, fluid milk originating in the relatively higher cost area of the New York milkshed is not in competition with milk originating from lower cost areas in other parts of the United States. Handlers supplying the New York Marketing Area have historically been able to obtain from the consumer of fluid milk a price which reflects the cost of its production plus a fair return. However, the production of milk in the New York milkshed has always shown a great annual cyclic variation even though the consumption is relatively stable. The excess of the supply of milk over the amount needed to meet a demand for fluid milk is referred to as "surplus." The cyclic variation of supply results in a great seasonal surplus in the late spring. In addition, a lesser, more constant surplus results from the need of handlers to have immediately available sufficient

supplies of packaged fluid milk to meet the daily demand of consumers which to some extent varies unpredictably from day to day.

Handlers must dispose of surplus milk by manufacture into by-products such as butter, cheese and dry ("powdered") milk. Because these by-products are much less perishable than fluid milk, there is a national market for them. The price obtainable for milk by-products manufactured from milk produced in the New York milkshed is depressed by competition with by-products manufactured from milk produced in lower cost areas throughout the United States. Thus, the economic burden of handling surplus milk produced in the New York milkshed is substantial. Prior to regulation, this fact generated great pressure on all members of the industry to increase their fluid utilization of milk. The producer was tempted to seek a price for his milk that was less than its fluid value but more than the "blended" value of fluid and manufactured uses. A handler with a fluid utilization higher than average could afford to pay such a price. But this disproportionately shifted the economic burden of disposition of surplus milk to other handlers and made it difficult or impossible for them to pay their producers even a blended price. Some handlers respond by desperately cutting resale prices to attract a larger share of the fluid market.

This left them still less able to pay producers a fair return and induced destructive price cutting at all levels throughout the industry. The situation became so oppressive to many producers that they threatened to, and in some cases actually did, withhold milk altogether from the market to enforce their demands for a fair and stable price. See *United States* v. *Rock Royal Cooperative, supra,* at 550; Joint Legislative Committee to Investigate the Milk Industry, Report, N. Y. Legis. Doc. 81 (1937).

It was natural for government to respond to such an emergency by the adoption of milk control laws. The first were state laws. The first in the northeastern part of the country was adopted by New York. N.Y.L. 1933 c. 158. Almost immediately New Jersey adopted a very similar act. N.J.L. 1933 c. 169. These acts established administrative agencies with power to fix the minimum prices payable to producers. They did not provide for pooling milk in the entire market area. Thus the temptation to handlers to cut resale prices in order to attract a larger share of the fluid market and to unburden themselves of surplus production of their regular producers would without more subsist. (Such handlers would have to supplement their supply during short seasons by purchases from other handlers or from producers other than their regular producers.) Therefore, the scope of the state regulatory acts was not limited to control of prices payable to producers. Primarily for this reason, to assure equitable sharing of the burden of surplus among all producers needed to supply the market, both the New York and New Jersey acts authorized their administrative agencies to fix resale prices of milk. N.Y.L. 1933 c. 158, Art. XXV Sec. 312(b); N.J.L. 1933 c. 169, Art. VII Sec. 1(a). Other reasons making necessary the fixing of resale prices include:

> "To meet the demands of distributors that their margins be protected so that they can pay the required minimum prices to producers and still remain in business.
>
> • • •
>
> To insure against price manipulation by certain types of distributors for the purpose of strengthening their competitive position in a market at the expense of other dealers.
>
> To check or eliminate the granting of unfair price concessions by milk dealers to chain stores and other

customers that happen to have exceptional bargaining power. The belief is widely held that such concessions often have been greater than the economies of services warranted, with the result that the favored customers were subsidized at the expense of others.

To bring the determination of retail and wholesale prices into the open and to substitute democratic procedure for secret understandings or agreements among distributors. The latter, though illegal, can be avoided only with great difficulty when the determination of resale prices of milk is left in private hands."

*Spencer and Christensen, Milk Control Programs of the Northeastern States Part* 1 (*Bulletin* 908 *November* 1954 *Cornell University Agricultural Experiment Station, Ithaca New York*) 84 (1954). That Congress has not preempted the entire field of milk price control has been held in *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959), affirmed 31 N. J. 601 (1960).

The state acts forbade persons to operate as handlers (denominated "dealers" in the state acts) without first obtaining licenses. N. Y. L. 1933 c. 158, Art. XXV Sec. 308; N. J. L. 1933 c. 169, Art. V Sec. 1. These licenses were revokable not only for violation of price-fixing orders, but for a number of other reasons including rejection without reasonable cause of milk purchased from a producer, failure to account to a producer for any milk purchased, failure to keep proper records or furnish required information, continuation in a course of dealing of such a nature as to deceive or defraud customers, producers or consumers, continuation in a course of dealing of such a nature as to demonstrate an inability or unwillingness properly to conduct a milk business, and for any other act likely to undermine health standards or injurious to the public welfare or to trade or commerce or which might demoralize the price structure or interfere with an ample supply of milk for the inhabitants of the state.

The state acts also granted their administrative agencies regulatory power in the broadest terms which might be necessary to prevent the demoralization of the agricultural interests of the state. N. Y. L. 1933 c. 158, Art. XXV Sec. 303; N. J. L. 1933 c. 169, Art. III.

The sponsors of the state acts thought that it would be constitutionally possible to outlaw the sale within either state of milk which had been bought in another state from producers at a price below the minimum which the importing state's law required to be paid to its own producers for their milk according to its use value. Art. XXV Sec. 312(g) of the New York act, L. 1933 c. 158, reads in part as follows:

> "It is the intent of the Legislature that the instant, whenever that may be, that the handling within the State, by a milk dealer, of milk produced outside of the State, becomes a subject of regulation by the State, in the exercise of its police powers, the restrictions set forth in this act respecting such milk so produced shall apply and the powers conferred by this act on the board shall attach. After any such milk so produced shall have come to rest within the State, any sale, within the State, by a licensed milk dealer or a milk dealer required by this act to be licensed, of any such milk purchased from the producer at a price lower within this State than that required to be paid for milk produced within the State, purchased under similar circumstances, shall be unlawful * * *".

Art. VII Sec. 1(c) of the New Jersey act, L. 1933 c. 169, was practically identical.

Although the state acts were held basically constitutional, *Nebbia* v. *New York*, 219 U. S. 50, 54 S. Ct. 505, 78 L. Ed. 940 (1934) (upholding the New York act), and *State Board of Milk Control* v. *Newark Milk Co.*, 118 N. J. Eq. 504 (E.

& A. 1935) (upholding the New Jersey act), this court held in 1935 that the state acts, insofar as they attempted to reach across a state line to fix the price paid to a producer in another state even for milk to be shipped to and consumed in the first state, violated the commerce clause, *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U. S. 511 (1935). This resulted in the introduction into the Market Area of otherwise surplus milk from other nearby states in competition for the fluid sales in the Market Area and a rejuvenation of much of the general instability and economic hardship to producers in New York and New Jersey as had prevailed before the adoption of the state acts. This development militated against realization of the goals of the state acts. However, it did not defeat them altogether. This is evident from the fact that New Jersey continued to regulate prices payable to producers for milk produced in New Jersey and continued to fix resale prices for milk sold in New Jersey and to require licensing of handlers for more than 20 years after the *Seelig* decision.

In 1935, the Legislature passed a second Milk Control Act, N. J. Laws 1935, ch. 175, extending the original which was about to expire. This act, in turn, was extended and amended by N. J. Laws 1937, ch. 56 which was supplanted by another Milk Control Act in 1939, N. J. Laws 1939, ch. 82. Chapter 274 of the Laws of 1941 was the last and current enactment on this subject. N.J.S.A. 4:12A-1 *et seq.* This statute, together with the Department of Agriculture Act of 1948, N. J. Laws 1948, ch. 447, N.J.S.A. 4:1-24 through 41, which continued and transferred milk control functions to the Office of Milk Industry within the Department of Agriculture, constitutes New Jersey statutory law on this subject.

The preamble of the current statute illustrates the problem faced by State legislators and reveals the objective of the enactment. We set it out at length:

"Whereas, it is found and declared that an emergency exists affecting the milk industry in this State; in the interest of the health and welfare of the citizens of this State, it is necessary to continue control of the milk industry in this State; that this act is an emergency law, necessary for the immediate preservation of the public peace, to preserve, protect and promote the public welfare, health and safety, and enacted in the exercise of the police power reserved to the States to protect the citizens of this State in such respect; that it is made necessary by the conditions of unfair, unjust, destructive and demoralizing practices, heretofore existing or threatened, and presently threatening, in the production, sale and distribution of milk which are likely to result in the demoralization of the agricultural interests of this State engaged in the production of milk and the creation of conditions inimical to the health of the public of this State; that it is the policy and intent of this act to prevent these unfair, unjust, destructive and demoralizing practices by providing a reasonable return for the milk producer, so as to prevent possible curtailment of a sufficient supply of fresh, wholesome, sanitary milk for our citizens; and that it is necessary in order to assure an adequate supply of fresh, wholesome, sanitary milk and to protect the public health and welfare, to treat the production, sale and distribution of milk as a business affecting the public health and affected with a public interest; and that the period of public necessity for the regulation of the milk industry by the Milk Control Board (now the Office of Milk Industry) and the Director as herein set forth, during which this act shall be effective shall be until such date as the Legislature may designate to be the termination thereof * * *." N. J. Laws 1941, ch. 274, pp. 713-714.

Even after *Baldwin* v. *Seelig*, state producer price fixing remained at least partially effective. To the extent that it did the power to fix resale prices remained necessary.

Congress filled the gap in the extensive regulation of the milk business undertaken by the states which became apparent in the decision in the *Seelig* case by authorizing federal regulation of minimum prices payable to producers of milk in or affecting interstate commerce. On August 24, 1935 extensive amendments to the Agricultural Adjustment Act became effective. 49 Stat. 750. These amendments gave the federal Secretary of Agriculture power to issue orders concerning the marketing of milk which might embrace one or more of certain enumerated conditions, but no others. 49 Stat. 754, providing for a new section 8c(5)(A) of the Agricultural Adjustment Act, surviving as 7 U.S.C.A. 608c(5)(A). The enumerated conditions included the fixing of minimum prices payable to producers, but did not include any control over resale prices nor any provision for licensing. In another section providing for terms which the Secretary might include in marketing orders for agricultural commodities generally the Secretary was expressly denied power to fix resale prices for milk sold for consumption in fluid form. 49 Stat. 756, providing for a new section 8c(7)(B) to the Agricultural Adjustment Act, surviving as 7 U.S.C.A. 608c(7)(B).

Section 8(3) of the Agricultural Adjustment Act as passed in 1933 had granted the Secretary power to enter marketing agreements with handlers and producers of milk and to issue licenses to them to eliminate unfair trade practices. 48 Stat. 34. These licensing provisions were repealed by section 5 of the 1935 act. 49 Stat. 753.

Thus, Congress authorized the Secretary to exercise the one power constitutionally denied to the states in their extensive regulation of the milk business, the power to fix prices payable to producers for milk in or affecting inter-

state commerce. It expressly withheld from the Secretary power to fix resale prices of fluid milk. It repealed authority for federal licensing which might have seemed inconsistent with state licensing programs. If Congress had done nothing more, it would seem clear that it meant merely to supplement state regulatory power and not to supersede it. However, it went further than that and expressly directed the Secretary of Agriculture, whenever requested to do so by state authorities, to enter into a joint regulatory program with state authorities to insure uniformity in the formulation, administration and enforcement of federal and state programs. To this end it expressly authorized the Secretary of Agriculture "to issue orders * * * complementary to orders or other regulations issued by such [state] authorities * * *". This was done by section 18 of the 1935 amendatory act inserting a new subsection 10(i) in the Agricultural Adjustment Act, 49 Stat. 767. The new subsection read as follows:

> "(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture; Provided, That in-

formation furnished to the Secretary of Agriculture pursuant to section 8d(1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d(2) hereof."

This section survives as 7 U.S.C.A. 610(i).

The Committee on Agriculture had previously recommended a narrower grant of power to the Secretary. It recommended that the Secretary be authorized to confer with and hold joint hearings with state authorities, to avail himself of their services, records and facilities, and in other ways to cooperate with them. 74th Cong., H. Rep. 952 at 18. However, the subsection recommended by the committee itself stated that the purpose of the grant of power was "to promote uniformity in the formulation, administration and enforcement of federal and state programs * * *". *Id.* Since Congress went on to provide in the act as finally passed an express grant of power to the Secretary to issue orders complementary to those of the state authorities in order to provide uniformity of enforcement, it seems the unmistakable intent of Congress that the federal program was not to wholly supersede state power. It intended that state power even over prices payable to producers should subsist to the extent that regulation of interstate sales by producers which did not affect interstate commerce were beyond the power of Congress and reserved to the states. This is made clear by a consideration of the report of the Committee on Agriculture on the Agricultural Marketing Agreement Act of 1937 which reenacted all of the provisions of the Agricultural Adjustment Act discussed above. 75th Cong., H. Rep. 468. It discussed the grant of power

to the Secretary to fix "producer prices for interstate milk" and state regulation almost in the same breath without in any way implying that the state power was to be superseded:

> "* * * Milk is the only commodity for which producer prices for interstate milk may be fixed by the Secretary of Agriculture through orders under the Agricultural Adjustment Act. The necessity for price regulation in the case of milk has also been recognized by many States which have established milk boards to fix producer prices for intrastate milk, and the validity of such State regulation has been upheld by the Supreme Court (Nebbia v. New York (1934) 291 U. S. 502)." *Id.* at 3.

The continuation of limited state power over producer prices by concurrent orders was intended by Congress to achieve its own goal of fair distribution of the burden of surplus milk among all producers supplying a particular market.

The climate of constitutional law was much different in 1935 than immediately thereafter.

Congress could not anticipate the scope which the Supreme Court was soon to give to the commerce clause. Congress was not even certain of its power "to regulate the prices payable for milk sold in interstate commerce." The following quotation from the same committee report quoted in part above is illustrative:

> "REASONS FOR REENACTING THE MARKETING AGREEMENT AND ORDER PROVISIONS
>
> "The Supreme Court in United States v. Butler (1936), 297 U. S. 1, declared invalid the provisions of the Agricultural Adjustment Act authorizing production adjustment programs involving processing taxes

and benefit payments. The question as to whether Congress has the constitutional power to regulate interstate and foreign commerce in agricultural commodities through marketing agreements and orders as provided in the Agricultural Adjustment Act was not before the court and has not yet been determined by the court. Lower Federal court decisions have differed on the question, and in two cases courts have held that the marketing agreement and order provisions were inseparable from the production adjustment provisions which fell in the Butler case. As a consequence of these decisions, doubt has been cast on the validity of all the agreements and orders, and producers of milk, particularly in New England, are now suffering from a seriously demoralized price situation.

"The committee is of the opinion that Congress has the power to regulate interstate and foreign commerce in agricultural commodities in the manner provided in the act, and that an examination of the text and organization of the act and of its history shows these provisions are and were intended to be effective independently of the production adjustment provisions. The committee believes that this view will find the support of the Supreme Court.

"Whatever may be the case, in order that whatever decision which may ultimately be rendered with respect to these provisions may turn on their constitutional validity rather than on their separability, and in order that express authority be given to enter into new agreements and orders in the areas in which they are necessary, it is highly desirable that these provisions be reenacted."

For an example of this Court's ultimate broad interpretation of the commerce clause as applied to milk control, see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 62 S. Ct. 523, 86 L. Ed. 726 (1942). In 1935 complementary federal and state orders seemed to be the only way of assuring fair distribution of the burden of surplus milk.

The most famous exercise of the power of the Secretary to enter complementary federal-state orders was the issuance of the original Order 27 effective September 1, 1938, providing for pooling of the use values of all milk produced in the milk shed and payment of a uniform price to all producers. 3 Fed. Reg. 2100. New York State authorities issued a concurrent order in terms identical to the federal order, known as Order 126. See *United States* v. *Rock Royal Cooperative, Inc., supra*, at 539. That order did not embrace any part of New Jersey in the defined market area. The New York order was adopted pursuant to a memorandum of principles of cooperation entered by the federal Secretary of Agriculture and the New York Commissioner of Agriculture and Markets dated August 26, 1938. This memorandum recited that it embodied the policies of cooperation in section 10(i) of the Agricultural Adjustment Act as amended and reenacted by the Agricultural Marketing Agreement Act of 1937 discussed and quoted above. In it the Secretary and the Commissioner agreed to establish uniform provisions for the classification and pricing of milk. They agreed to act jointly in the formulation and issuance of concurrent orders. They agreed to establish a single agency for the administration of their complementary orders. The authority for the New York Commissioner to enter the agreement was contained in section 258-n of the Agriculture and Markets Act, enacted by N.Y.L. 1937, c. 383 which reads as follows:

> "The commissioner is hereby authorized to confer with legally constituted authorities of other states and of the United States with respect to a uniform milk control with states and/or as between states, and with the federal government in its control of prices of milk handled in interstate commerce, and may exercise his powers hereunder to effect such uniform milk control. He may join with such other authorities federal and state in conducting joint investigations, holding joint hearings and issue joint or concurrent orders, or orders supplementary to those of the federal government, and shall have the power to employ or designate a joint agent or joint agencies to carry out and enforce such joint, concurrent or supplementary orders."

This regulation of the New York milk marketing area continued without substantial change from 1938 until August 1, 1957 when it was expanded to include the 13 northern counties of New Jersey in the marketing area.

The New York marketing order is both one of the oldest and most extensive exercise of the powers granted to the Secretary of Agriculture by Congress. The Secretary has clearly and notoriously interpreted the law as authorizing him to exercise the power conferred on him concurrently with subsisting state power. If this interpretation by the administrative official charged with responsibility for executing the act had been erroneous, Congress would not have let more than 20 years pass without making clear its intent by some amendment of the law. *Cf. Lane* v. *Holderman*, 23 N. J. 304, 322 (1957).

A steady deterioration in north Jersey milk markets occurred in the years following World War II. It was characterized by importation of increasing quantities of unregulated milk. This milk could be purchased at levels below those imposed by the State of New Jersey on intra-

state milk. As a natural consequence, more and more New Jersey handlers utilized out-of-state sources for their Class I (fluid) requirements with a resultant reduction in the fluid utilization of New Jersey milk and a depression of the prices payable to New Jersey producers whose milk was increasingly devoted to surplus uses. Once again, milk strikes developed.

With an example of Federal-State cooperation at its doorstep (Federal Order 27 and New York Order #126), New Jersey started to consider joint regulation in the early 1950's. Initially a separate joint order, distinct from Order 27, was contemplated.

In anticipation of coordinated Federal-State regulation, a "Memorandum of Agreement", was completed on June 30, 1955. The document was signed by Earl L. Butz, Assistant Secretary of Agriculture, and Floyd R. Hoffman, Director of the Office of Milk Industry, State of New Jersey. The Director's authority for executing this document is found in section 25 of N. J. Laws 1941, ch. 274, N.J.S.A. 4:12A-25:

> "For the furtherance of the objects stated in this act *the director shall have authority to enter into agreements with* state, county and municipal agencies and with other states and *the federal government.*" (Emphasis supplied.)

This provision was first enacted effective June 1, 1935. N. J. L. 1935, c. 175, §§307 and 903.

Section I of the memorandum provides:

> "The Secretary of Agriculture and the Director of the Office of Milk Industry shall work together in matters pertaining to the regulation, as provided in the federal act, of the procurement of milk by handlers and milk dealers who market or in any manner participate in the procurement, processing, or distribu-

tion of milk produced to be marketed in such marketing area or areas as shall be defined in such order or orders. Such collaboration is deemed to include but is not limited to: preliminary investigation, arrangement for and conduct of public rulemaking proceedings in the manner, and to the extent permitted under the Federal act, Rules and Regulations issued thereunder and the Administrative Procedure Act, appraisal of record evidence, consultation in an effort to reach agreement on all essential provisions supported by evidence in the record, prior to the issuance of any complementary or concurrent order or an amendment thereto."

The agreement is set out at length in Appendix A.

After publication of the required notice (O. M. I. notices relating to the original hearing and the hearing preceding the September 1, 1958 amendment, will be found in Appendix B, p. 20), public hearings were conducted by representatives of the Federal Department of Agriculture, State of New Jersey and State of New York. The hearings commenced on June 18, 1956 and continued for 102 working days. The last hearing was held on March 29, 1957. Over fifteen thousand pages of transcript and 222 exhibits were presented.

The Director of the Office of Milk Industry, thereafter, issued official Order #57.3, effective August 1, 1957. Federal Order #27 and New York Order #126 were amended, effective the same date. Each of the orders is identical in all major respects. (Pertinent parts of Official Order #57.3 will be found in Appendix C, p. 23.) One of the significant changes in the regulatory program was the inclusion of northern New Jersey in the marketing area. The following counties which comprise New Jersey Milk Marketing Area No. 1 were added: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the

boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Shipbottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford and Union); Passaic; Somerset; Sussex; Union; and Warren.

On August 1, 1957, the Director of the Office of Milk Industry designated the Market Administrator of both Federal Order 27 and New York Order 126, Charles J. Blanford, as his agent to administer official Order #57.3 in marketing area #1 (the New Jersey territory within Order 27). Provision was made for his salary, and Mr. Blanford was required to furnish the Director with a surety bond.

After notice and hearing, section 927.29(d) of the concurrent and complementary orders was amended effective September 1, 1958. Under the original language of the section, the handler made a monthly choice between full and partial regulation. As the section now stands, the handler, absent a monthly election to be partially regulated, is fully regulated.

The period since joint regulation of the northern New Jersey area began has seen a restoration of order to the market. These stabilized marketing conditions are the direct result of the application of the jointly administered market-pool program to an area protected by compensatory payment provisions from the pirating of the fluid market by handlers and producers unwilling to share the burden of surplus production of producers needed to supply the market year round. Outlawing of the compensatory payment provision will again subject the marketing area to an influx of unregulated surplus milk and bring about a renewal of these recently averted chaotic conditions with consequential dangers to the necessary supply of milk for New Jersey citizens.

# *ARGUMENT*

## POINT I

**The provision in Section 927.83 of Order 27 establishing the *quantum* of compensatory payment as the difference between the use values for fluid and manufactured milk carries out the intent of Congress.**

It has been developed in the Statement of the Case that the problem which prompted Congress to enact the legislation authorizing Order 27 and similar milk marketing orders was the chaos resulting from attempts by handlers and producers to win a share of the New York fluid milk market without bearing a proportionate share of the burden of disposition of the surplus milk of producers needed to supply the year round demands of the market area. It is well settled that statutes should be interpreted to achieve the Congressional purpose. The secretary has found on the record that the only way under the circumstances existing in the New York market to prevent certain handlers and producers from defeating the intent of Congress by winning a share of the fluid market without undertaking the burden of surplus is to require compensatory payments of non-pool handlers measured by the difference between use values of fluid and surplus milk.

It is true that the compensatory payment provisions of Order 27 impose a different net result on pool handlers and non-pool handlers. However, this difference in treatment is justified even under the uniformity provisions of §608c(5)(A). It is submitted that the uniformity provisions were adopted to prevent discrimination based on geographic location, to prevent the secretary from setting up a federal region in which discrimination might be practiced against outsiders in a way that states were forbidden to discriminate against outsiders by the Commerce

Clause. But the different treatment of pool and non-pool handlers under the compensatory payment provisions is not based on geographic location but on the handler's function in servicing the market. If a handler seeks to meet the fluid needs of the market and bears a proportionate share of the burden of disposition of surplus milk of producers needed to serve the fluid market year round, he is treated one way. If a handler seeks to service part of the fluid market but is unwilling to bear a proportionate share of the disposition of surplus, he is treated in a different way.

This *amicus curiae* agrees with the contention made by the government that the uniformity provisions apply only to pool handlers. However, it is submitted that even if the court does not so hold, this provision should be construed to permit different treatment based on different function in servicing the market area where such different treatment is necessary to carry out the intention of Congress and is supported by the record, just as differentials in Order 27 have been upheld.

## POINT II

### The uniformity provision of Section 608c (5)(A) must be construed in relation to the provisions of Section 610(i) authorizing the Secretary of Agriculture to cooperate with State authorities.

In construing the uniformity requirement of Section 608c (5)(A) and determining whether the payments in question come within the coverage of that section, a study of Section 610(i) is helpful. It should be borne in mind that the latter Section was designed to meet a specific need. State regulation of peripheral handlers had been nullified by the *Baldwin* v. *Seelig* decision. Thereafter, no state acting alone could impose a completely effective milk con-

trol program because unregulated out-of-state supplies had disruptive effects upon the intrastate plan. This was the problem and only federal action, either by supersedure or cooperative effort, could apply controls on a regional basis and make them truly efficacious.

The conclusion that vigorous and wholehearted Federal-State cooperation was sought is apparent from a reading of Section 610(i):

> "The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of sections 601-608, 608a, 608b, 608c, 608d-612, 613, 614-619, 620, 623, and 624 of this title and in order to obtain uniformity in the formulation, administration and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 608c of this title) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: * * *"

Mr. Justice BLACK's comments on this section in his dissenting opinion in *Hood* v. *DuMond*, 336 U. S. 525, 560 (1949) are apt.

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their se-

lected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation betwen New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

It is submitted that Section 608c(5)(A), in light of the above problem and congressional approach, should not be subject to an unnecessarily restrictive construction. The interpretation of the uniformity provision of Section 608c (5)(A) reached in *Kass* v. *Brannan*, 196 F. 2d 791 (C. A. 2, 1952), cert. denied, 344 U. S. 891, results in a frustration of the joint regulatory program.

The better approach may be found in a recently decided district court case, *Lawson Milk Co.* v. *Benson*, Civil No. 34708 (D. Ohio, Aug. 18, 1960). Judge McNamee was confronted with a like compensatory payment provision contained in Order 75 (Cleveland, Ohio area). There, too, the partially regulated handler argued that exaction of a similarly computed compensatory payment was in violation of 608c(5)(A) and based his case upon the *Kass* v. *Brannan* decision. The court in rejecting this precedent, held that a compensatory payment is not a part of the minimum class price and thus not within the uniformity requirement. Judge McNamee concluded that he was not bound by *Kass*. He noted, however, that Judge Clary, who decided this case below, felt bound to follow the *Kass* holding.

## POINT III

**Partial regulation by way of Compensatory Payments is an election offered to Appellees in lieu of full regulation.**

In establishing the boundaries of a regional milk marketing area, it is inevitable that the line set, literally speaking, will divide some outside handlers from a small segment of their market located within the order area. This will be true no matter where the line is drawn. The existence of these peripheral dealers creates a dilemma. If allowed to make Class I sales within the area without financial obligation to the pool, the fully regulated members will be deprived of fluid utilization with a resulting reduction in the blend price. The disruptive effect will increase proportionately with the amount of outside intervention. This kind of situation invites the dumping of surpluses. Thus, the alternative of nonregulation is not desirable.

Full regulation is another alternative. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C. A. 3). This method of regulation will assure the integrity of the market. It is, however, a costly solution for peripheral handlers with minimal sales within the area.

Compensatory payments are the middle ground. This method of control, generally termed partial regulation, gives these handlers a market outlet within the pool at much less cost than full regulation entails. This method is offered under Section 927.29(d) of the joint orders. The payment is calculated to reimburse producers under the orders for the loss of fluid sales and provides the partially regulated handler with a return in line with that available elsewhere for this milk. The handler is given the privilege of avoiding the more onerous financial obliga-

tions associated with full regulation by making a monthly election to be partially regulated. Thus, the compensatory payment is not a barrier erected to isolate the pool from outside supplies, but rather a "necessary and incidental" device offered to non-pool handlers to give them access at a cost which is equated to balance the equities between pool and non-pool producers.

## CONCLUSION

**The judgment of the Court of Appeals should be affirmed.**

Respectfully submitted,

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*Attorney for Floyd R. Hoffman, Director of the Office of Milk Industry, Department of Agriculture, State of New Jersey, Amicus Curiae.*

WILLIAM L. BOYAN,
Deputy Attorney General,
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November 1, 1961

[APPENDICES FOLLOW]

# APPENDIX A

## Memorandum of Agreement Between the United States Secretary of Agriculture and the Director of the Office of Milk Industry of the State of New Jersey for the Formulation and Administration of Rules and Orders for Milk for Marketing Areas in New Jersey

In order that the policies of cooperation embodied in Public Act No. 10, 73rd Congress, as amended and as reenacted by the Agricultural Marketing Agreement Act of 1937 (7 U. S. C. 601 *et seq.*) hereinafter referred to as the Federal Act and Section C.4:12A-25, Chapter 274 P.L. 1941, as amended by Chapter 447 P.L. 1948, as amended by Chapter 159 P.L. 1952, State of New Jersey, Department of Agriculture, Office of Milk Industry, hereinafter referred to as the State act may be effectuated in a practical way, the procedure outlined below is hereby adopted by the Secretary of Agriculture of the United States and the Director of the Office of Milk Industry, State of New Jersey as the framework within which the parties hereto will cooperate with each other in connection with milk orders applicable to the handling of milk in marketing areas located in the State of New Jersey.

### I

The Secretary of Agriculture and the Director of the Office of Milk Industry shall work together in matters pertaining to the regulation, as provided in the Federal act, of the procurement of milk by handlers and milk dealers who market or in any manner participate in the procurement, processing, or distribution of milk produced to be marketed in such marketing area or areas as shall be defined in such order or orders. Such collaboration is deemed to include but is not limited to: preliminary investigation, arrangement for and conduct of public rule making proceedings in the manner, and to the extent permitted un-

der the Federal act, Rules and Regulations issued thereunder and the Administrative Procedure Act, appraisal of record evidence, consultation in an effort to reach agreement on all essential provisions supported by evidence in the record, prior to the issuance of any complementary or concurrent order or an amendment thereto.

II

In the event that complementary and concurrent Federal and State orders, rules or regulations prove to be feasible, the following standards or practices will be observed.

*Uniform Provisions*

The Secretary of Agriculture and the Director of the Office of Milk Industry shall, in their respective complementary and concurrent orders for marketing areas within the State of New Jersey, establish identical regulatory provisions to the extent authorized by the respective Federal and State acts. Notwithstanding the fact that the Director of the Office of Milk Industry may have authority under the state law to regulate milk or the handling thereof in ways other than is authorized by the above cited Federal statute, the state order herein described shall be limited to the same terms and conditions as may be included in the Federal Milk Order.

*Administrative Agency*

The Secretary of Agriculture will consult with the Director of the Office of Milk Industry prior to the designation of the agency to administer the Federal order and the Director of the Office of Milk Industry will utilize the same agency for the administration of the concurrent state order, which shall be a market administrator. Except as otherwise agreed to in writing between the parties here-

to, the duties of the market administrator shall be confined to the administration of the orders pursuant to which he has been designated and, while serving in such capacity, the market administrator and such personnel as may be employed by him shall not be utilized by either the Federal or State authorities during the period of employment, in the administration of any other orders not common to both authorities. All employees shall be under the exclusive direction of the market administrator and may be utilized to carry out any of his duties. Nothing in this arrangement shall be deemed to change the responsibility of the market administrator to the Secretary of Agriculture or to change the status of the market administrator or that of any of his employees as persons engaged in the administration of a Federal milk order or as affecting or modifying in any way such rights, duties or privileges as may exist by reason thereof. The Secretary of Agriculture and the Director of the Office of Milk Industry may also designate the same person as the market administrator of other complementary and concurrent orders.

*Acquisition and Use of Information*

In view of the use of a single agency to administer such complementary and concurrent orders and the impracticability or impossibility of identifying information that may be considered as having been received pursuant to one order as distinguished from the other all information received by such agency pursuant to such orders shall be considered as received under both orders insofar as the provisions of 7 U. S. C. 608d of the Federal Act and Section C.4:12A-25 of the State Act regarding the confidentiality of such information are applicable. Therefore, in accordance with the requirements of 7 U. S. C. 610(i) of the Federal Act, the Director of the Office of Milk Industry agrees that any and all information acquired from the common agency administering such orders will be kept

confidential by himself and by all persons associated with him who have access to or use it in the course of their official duties, in a manner similar to that required of Federal officers and employees under the provisions of 7 U. S. C. 608(d)(2).

*Finances*

Expenses incurred in the maintenance of the market administrator's office and in the exercise of his specified powers and duties shall be paid for from funds collected for this purpose pursuant to the respective complementary and concurrent orders applicable to the same marketing area. Disbursements from the funds so collected shall be at the direction of the market administrator, subject to supervision by the Secretary of Agriculture and to audit by both Federal and State authorities.

Administrative expenses shall constitute only those expenses incurred in the performance of the duties of the market administrator as set forth in the respective complementary and concurrent orders applicable to a given marketing area as distinguished from expenses incurred by the Federal or State governments in the administration of their respective statutes, or in the enforcement of such orders.

*Administration*

The market administrator designated under complementary and concurrent orders shall use a uniform system in securing periodical reports from handlers and milk dealers, in auditing and verifying the same and in making any and all necessary corrections or adjustments. The general policy of the cooperation shall be understood to extend to the interpretation or application of uniform or similar provisions. The books, records, and accounts of the market administrator shall be open for inspection and audit to the Secretary of Agriculture and the Director of the Office of Milk Industry.

## *Appendix A*

### *Enforcement*

The failure of any person to comply with any of the provisions of a complementary and concurrent order shall be regarded as of mutual concern, and the respective governmental authorities shall be kept fully advised in regard thereto.

In all matters affecting enforcement of their respective complementary and concurrent orders applicable to the same marketing area, the Secretary of Agriculture and the Director of the Office of Milk Industry will undertake to utilize all means at their disposal for the effective enforcement of such orders.

### III

The failure of the Secretary of Agriculture and the Director of the Office of Milk Industry to agree with respect to any aspect of the regulatory programs which are the subject matter of this agreement shall not in any way restrict the parties hereto from independently exercising their respective authorities under the Federal Act or the State Act. In the event of the issuance of complementary or concurrent orders or amendments thereto, it is not intended that such issuances shall make the orders dependent in whole or in part upon each other for their validity or legal force and effect.

### IV

This Memorandum of Agreement shall be operative and effective when signed by the Secretary of Agriculture and by the Director of the Office of Milk Industry and can be terminated on notice by either party.

Done at Washington, D. C., this 30th day of June 1955

/s/ Earl L. Butz, Assistant Secretary of Agriculture Done at Trenton, New Jersey, this day of May 31, 1955

/s/ Floyd R. Hoffman, Director, Office of the Milk Industry, State of New Jersey

# APPENDIX B

## Office of Milk Industry Notices

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

### NOTICE OF HEARING

In order to consider proposals by the United States Secretary of Agriculture to create a new and separate Federal marketing area under the Agriculture Marketing Agreement Act of 1937 (7 U.S.C. 601, et seq.), which would include northern New Jersey, and to consider specific proposals in respect to the terms of such an order should it be promulgated,

NOTICE IS HEREBY GIVEN that pursuant to P.L. 1941, c. 274, as amended (N.J.S.A. 4:12A-1, et seq.), the Office of Milk Industry will conduct a public hearing jointly and concurrently with the United States Department of Agriculture commencing Monday, June 18, 1956, at 10:00 A.M. in the Robert Treat Hotel, Park Place, Newark, New Jersey, for the purpose of receiving evidence concerning the proposals outlined above and relating to matters set forth in the Notice of Hearing of the United States Department of Agriculture, signed by Roy W. Lennartson, Deputy Administrator, Agriculture Marketing Service, on May 18, 1956, and published in the Federal Register (21 F.R. 3537), which terms, proposals and amendments are herein incorporated by reference.

Copies of this notice and of the notice of the United States Department of Agriculture, together with proposals and proposed amendments attached thereto, may be obtained from the Office of Milk Industry, Department of Agriculture, State of New Jersey, 1 West State Street, Trenton, New Jersey.

Floyd R. Hoffman
FLOYD R. HOFFMAN, Director
Office of Milk Industry

Dated: June 11, 1956

*Appendix B*

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

SUPPLEMENTAL NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that the Notice of Hearing issued by the Office of Milk Industry, Department of Agriculture, June 11, 1956, relating to the conduct of a public hearing jointly and concurrently with the United States Department of Agriculture to consider proposals by the United States Secretary of Agriculture to create a new and separate marketing area under the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601, et seq.), which would include Northern New Jersey (21 F.R. 3527), is hereby amended to include as part of the hearing, consideration of whether, on the basis of the entire record, a single marketing agreement and order regulating the handling of milk for a marketing area consisting of all the territory in the States of New York and New Jersey for which regulation has been proposed in the original Notice of Hearing, should be issued and would better effectuate the purposes of the act than would two or more separate marketing agreements and orders for such territory.

Specific terms and proposals that will be considered in the hearing as outlined in this amended Notice are contained in the Supplemental Notice of Hearing of the United States Department of Agriculture signed by Roy W. Lenmartson, Deputy Administrator, Agricultural Marketing Service on February 26, 1957 and are, together with other supplemental Notices of Hearing issued by the United States Department of Agriculture (21 F.R. 3799, 21 F.R. 6680), incorporated herein by reference.

FLOYD R. HOFFMAN
Floyd R. Hoffman, Director
Office of Milk Industry

Dated: March 6, 1957

*Appendix B*

STATE OF NEW JERSEY
DEPARTMENT OF AGRICULTURE
OFFICE OF MILK INDUSTRY

NOTICE OF HEARING

NOTICE IS HEREBY GIVEN that pursuant to P.L. 1941, C.274, as amended (N.J.S.A. 4:12 A-1 et seq.), and particularly Section 25, the Office of Milk Industry will conduct a public hearing jointly and concurrently with the United States Department of Agriculture commencing at 10 A. M. on February 3, 1958 at the Utica Hotel, Utica, New York, and at 10 A.M. on February 5, 1958 at the Hotel Robert Treat, Newark, New Jersey, for the purpose of receiving evidence concerning the proposals outlined and relating to matters set forth in the Notice of Hearing of the United States Department of Agriculture (Doc. No. AO-71-A34), signed by Roy W. Lennartson, Deputy Administrator, Agricultural Marketing Service, on January 21, 1958 and supplemental notice thereto, signed January 24, 1958 by F. R. Burke, which terms, proposals and amendments are herein incorporated by reference.

Copies of this notice and of the notice of the United States Department of Agriculture, together with proposals and proposed amendments attached hereto, may be obtained from the Office of Milk Industry, Department of Agriculture, State of New Jersey, 1 West State Street, Trenton, New Jersey.

Floyd R. Hoffman
FLOYD R. HOFFMAN, Director
Office of Milk Industry

DATED: January 27, 1958

# APPENDIX C

## Pertinent Parts of Official Order 57.3

DEFINITIONS

* * *

*Sec. 927.3 Marketing area.* "New York-New Jersey milk marketing area" (hereinafter called the "marketing area") means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section together with all piers, docks, and wharves connected therewith, and all craft moored thereat, and including territory within such boundaries which is occupied by Government (Municipal, State, Federal, or International) reservations, installations, institutions, or other establishments.

(*a*) The city of New York and counties of Nassau, Suffolk (except Fisher's Island), and Westchester in the State of New York (such territory being referred to hereinafter as the "New York metropolitan district").

(*b*) The following counties and parts of counties in the State of New York: Albany, Broome; Cayuga (except the townships of Sterling, Victory, Conquest, and Montezuma); Chemung; Chenanogo; Columbia; Cortland; Delaware; Dutchess; that part of Essex consisting of the townships of Schroon, Ticonderoga, Crown Point, and Moriah; Fulton (except the township of Stratford); Greene; Herkimer (except the townships of Webb, Ohio, and Salisbury); Madison; Montgomery; Oneida (except the townships of Ava, Boonville, Forestport, and Florence); Onondaga; Orange; Oswego (except the townships of Redfield and Boyiston); Otsego; Putnam; Rensselaer; Rockland; Saratoga (except the townships of Day, Edinburg, and Providence); Schenectady; Schoharie; Schulyer; that part of Steuben consisting of the townships of Addison, Corning,

and Erwin; Sullivan; Tioga; Tompkins; Ulster; Warren (except the townships of Johnsburg, Thurman, and Stony Creek); Washington; and Yates (except the townships of Italy, Middlesex, and Potter); and in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren:

* * *

*Sec. 927.5 Dairy farmer.* "Dairy farmer" means any person who produces milk.

*Sec. 927.6 Producer.* "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant: *Provided*, That a dairy farmer who, if not a producer pursuant to this order, would be defined as a producer under another order issued pursuant to the Act shall not be a producer under this order if the milk received from all such dairy farmers at the plant is assigned to Class III, or is subject to payments at the rates specified in Sec. 927.83 (b)(2), or is subject to payments at the rates specified in Sec. 927.83(b)(1) and the milk is priced at the lowest class price under the other order.

*Sec. 927.7 Handler.* "Handler" means (a) any person who engages in the the handling of milk or products therefrom, which milk was received at a pool plant, or a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy

farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

* * *

*Sec. 927.29 Temporary pool plants.* Except for plants which, pursuant to paragraph (a) of Sec. 927.27 or pursuant to the proviso of paragraph (c) or to paragraph (e) of this section, are not eligible for designation, any plant not designated pursuant to Sec. 927.25 or Sec. 927.28 shall automatically be designated a pool plant in accordance with provisions of paragraphs (a) through (d) of this section: *Provided*, That no plant shall be a pool plant pursuant to this section (1) in any month in which it is a pool plant pursuant to provisions of Federal Order No. 119, or (2) in any of the months of December through June if it was a pool plant pursuant to provisions of Federal Order No. 119 in each of the preceding months of July through November.

(*a*) For any of the months of January through March and July through December, any plant at which 25 percent or more of the receipts of milk from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk shall automatically be designated a pool plant for such month.

(*b*) For any of the months of April, May, or June, any plant at which during the preceding period of October, November, and December either (1) no milk was received from dairy farmers, or (2) 60 percent or more of the milk received from dairy farmers was classified in Class I-A on some basis other than the failure to account for such milk, shall automatically be designated a pool plant for any of

such months of April, May, or June in which 10 percent or more of the milk received from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk.

(*c*) Any plant which is a pool plant in any of the months of April, May, or June on the basis of paragraph (b) of this section shall be a pool plant in any of the months of July through March following in which 60 percent or more of the milk received at the plant from dairy farmers is classified in Class I-A and Class I-B: *Provided*, That upon written request presented to the market administrator by the handler, the plant shall not be a pool plant on any basis from the month following receipt of such request until the following July 1.

(*d*) Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B; *Provided*, That such plant shall not be a pool plant if the handler operating the plant elects at the time of filing the report pursuant to Sec. 927.50 not to have the plant designated a pool plant, and to make payments into the producer settlement fund at the rate specified in 927.83 (b) for any nonpool milk or skim milk which, on the basis of products distributed in the marketing area to purchasers other than other plants is classified as Class I-A, Class II, or as skim milk subject to the fluid skim differential: *Provided further*, That such plant shall not be a pool plant, if in the absence of this provision, milk received from farmers at the plant would be classified and

priced under another order issued pursuant to the Act, with a provision for market-wide equalization, and if the percentage of the milk received from dairy farmers at the plant which is classified as Class I-B and disposed of in the marketing area defined in such other order is greater than the percentage of such milk classified as Class I-A.

* * *

[NOTE: As in effect for the period prior to September 1, 1958 paragraph (d) reads as follows:]

(*d*) Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section (except a plant which is not a pool plant pursuant to the proviso in paragraph (c)), but from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month at the option of the handler, exercised at the time of filing the report pursuant to Sec. 927.50, if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B: *Provided*, That a plant at which, except for this paragraph, milk received from farmers would be classified and priced under another order issued pursuant to the Act, shall not be a pool plant pursuant to this paragraph unless the percentage of the milk received from dairy farmers at the plant which is classified in Class I-A is greater than the percentage of such milk which is classified in Class I-B and disposed of in the marketing area defined in such other order.

*Sec. 927.83 Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers, through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d)

of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

(*a*) Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk, which milk or milk products meets each of the following conditions:

(*1*) It was derived from milk received at a nonpool plant from dairy farmers, from dairy farmers defined as producers pursuant to the provisions of Federal Order No. 119, or received from a handler designated as a producer-handler pursuant to Sec. 927.15.

(*2*) It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

(*3*) The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

(*b*) The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

(*1*) If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the Act, the amount of payment on such products, except skim milk, shall be any plus amount obtained by substracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in ac-

cordance with the classification and pricing set forth in this subpart: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order: *Provided further*, That no payment shall be applicable to milk distributed on routes in the marketing area defined in this order from a plant which is a pool plant under provisions of Federal Order No. 119. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant, except that no payment shall be applicable to packaged skim milk classified and priced under provisions of Federal Order No. 119.

(2) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the Act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

(*3*) If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the Act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b) (9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Provided*, That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

(*4*) For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

(*5*) In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value

shall be computed on the basis of milk containing 3.5 percent of butterfat.

(*c*) Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

(*1*) By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

(*2*) By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

(*3*) By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

(*d*) The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

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# In the Supreme Court of the United States

October Term, 1961

[illegible] Cooperative Farmers, Inc. and Sun-[illegible] Farms, Inc., petitioners

United States of America and Orville L. Freeman, Secretary of Agriculture

On [illegible] to the United States Court of [illegible] for the Third Circuit

[illegible]

[illegible]
Solicitor General,
William H. [illegible], Jr.,
Assistant Attorney General,
[illegible]
[illegible]
Attorneys,
Department of Justice,
Washington 25, D.C.

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Assistant General Counsel,
Department of Agriculture, Washington 25, D.C.

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7 C.F.R. 927.84 ..... 12, 22
3 F.R. 1945, 1957, 2100, 2102 ..... 7
10 F.R. 6156 ..... 8
11 F.R. 11120 ..... 23
18 F.R. 8444 ..... 23
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22 F.R. 4643 ..... 8
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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC. AND SUN-CREST FARMS, INC., PETITIONERS

*v.*

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE RESPONDENTS

### OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 210a) is reported at 183 F. Supp. 80. The opinion of the United States Court of Appeals for the Third Circuit (R. 897) is reported at 287 F. 2d 726.

### JURISDICTION

The judgments of the Court of Appeals were entered on February 20, 1961 (R. 907–909). A timely petition for rehearing was denied on March 10, 1961. (R. 909–911.) The petition for a writ of certiorari was filed on April 12, 1961, and granted on June 19,

1961 (R. 911). 366 U.S. 957. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Agricultural Marketing Act of 1937, 7 U.S.C. 601 *et seq.*, authorizes the provisions of the New York-New Jersey Milk Marketing Order No. 27, 7 C.F.R. 927.1 *et seq.*, which require petitioners (milk handlers who do not belong to the marketwide pool established by the order) to make compensatory payments, into a producer-settlement fund, on fluid milk which they dispose of in the marketing area.

2. Whether, having elected, and accepted the benefits of, partial rather than full regulation under the terms of Order No. 27, petitioners are estopped from challenging the validity of an essential feature of that partial regulation.

3. Whether, if the partial regulation of petitioners provided for in Order No. 27 is invalid, petitioners are subject to full regulation under the order.

## STATUTE INVOLVED

The relevant provisions of the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, are set forth in the Appendix, pp. 60–63, *infra*.

## STATEMENT

### 1. THE ECONOMIC AND STATUTORY BACKGROUND

This case presents issues connected with the regulation of the milk industry. As this Court has stated,

such issues are "entwined with * * * factors that call for understanding of the milk industry," [1] the economy of which "is so eccentric that economic controls have been found at once necessary and difficult." [2] The factors which render such regulation imperative have been explained in detail in *Nebbia* v. *New York*, 291 U.S. 502, 516–518, and *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 549–550, and will be dealt with only briefly here.

Since milk is an essential element of diet, and in particular of young infants, the public interest requires a constant, adequate supply of wholesome milk. The demand and supply of milk, however, are subject to sharp variations. Apart from considerable fluctuations in the daily demand for milk, there are seasonal cycles in the supply, as the result of which there is nearly twice as much milk available in June as there is in November. Storage of the excess supply to meet a later peak in demand is not possible because of the highly perishable nature of milk.[3]

Surplus milk, *i.e.*, the milk which exceeds the current demand for fluid milk as a food beverage, can be utilized in the production of butter, cheese, milk powder, and similar items. For those purposes, however, it can be sold only at a greatly reduced price. Consequently, in unregulated markets all pro-

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[1] *United States* v. *Ruzicka*, 329 U.S. 287, 294.

[2] *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 529.

[3] Thus, in order to insure satisfaction of the daily demand, the milk industry must carry a surplus of about 20% (*Nebbia* v. *New York*, 291 U.S. 502, 517); a supply sufficient to meet the needs in November necessitates a surplus of more than 50% during the flush season in June.

ducers compete most eagerly for the more profitable sales of fluid milk. The resulting cut-throat competition readily engenders business practices which jeopardize "the quality and in the end the quantity"[4] of the vital fluid milk supply.

The principal problem therefore is to find a method by which the burden of the surplus milk may be borne equitably by the entire industry, *i.e.*, by all the producers and the handlers (distributors) of the milk. One method designed to achieve this end was first developed by cooperatives. Under this plan, the cooperative would sell its members' milk for a variety of uses and at a variety of prices, place the proceeds into a single fund, and pay each member on an equal basis according to the quantity of milk supplied by him, not according to the purposes for which his particular milk has been used. By this method of "blending" the price, the burden of surplus milk is spread evenly over all the members of the cooperative.[5] The inherent weakness of this system is that an individual dairy farmer who refuses to join the cooperative can profitably escape assuming his share in the surplus milk burden by selling all his milk to a distributor with a high ratio of fluid milk sales at a price lower than the cooperative's price for fluid milk but higher than the blended price received by the cooperative farmers.

State legislation passed during the depression to give statutory sanction to minimum prices was found

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[4] *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 550.

[5] Cf. *Barns* v. *Dairymen's League Co-op. Assn., Inc.*, 220 App. Div. 624, 630 (N.Y.).

to be constitutional in *Nebbia* v. *New York*, 291 U.S. 502. State control of the milk industry, however, had one serious deficiency. Much of the milk consumed in the large metropolitan centers moves in interstate commerce[6] and the States lack the power to regulate the price to producers in other States. *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511.

To deal with the problem which cooperatives and state regulations had been unable to solve, Congress entered the field—first under the Agricultural Adjustment Act Amendments of 1935, Section 5 (49 Stat. 753), and then under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, which, as amended, is now in effect. 7 U.S.C. 601 *et seq.*[7] The latter Act establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, interstate or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish as the prices to farmers, parity prices * * *" and as will avoid

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[6] Only 70% of the milk of the New York City metropolitan area originates in New York State. *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511, 519. The City of Boston obtains about 90% of its fluid milk from States other than Massachusetts. *H. P. Hood & Sons* v. *DuMond*, 336 U.S. 525, 526.

[7] Shortly after the decision in *Baldwin* v. *G. A. F. Seelig*, 294 U.S. 511, the States of New York, New Jersey, Pennsylvania, Maryland, Massachusetts, Vermont, and Connecticut petitioned the Secretary of Agriculture that he exercise his licensing powers under Section 8(3) of the Agricultural Adjustment Act (48 Stat. 34–35) to regulate milk moving in interstate commerce. See Brief for Appellant, pp. 17–19, in *Noyes* v. *Rock Royal Co-op., Inc.*, October Term, 1938, No. 826.

unreasonable fluctuations in supplies and prices. 7 U.S.C. 602.

The regulatory plan of the statute, described and held constitutional in *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, authorizes the Secretary of Agriculture to issue regional marketing orders, each order being specially adapted to the conditions of the area in which it is to be effective. 7 U.S.C. 608c(5), (11). The basic function of the orders is to establish minimum use prices and to assure the payment of uniform minimum prices to farmers by "handlers," a term defined as meaning "processors, associations of producers, and others engaged in the handling of * * * " the commodity or product.

To this end, Section 8c(5), 7 U.S.C. 608c(5), *infra*, pp. 60–62, provides that a milk order shall contain one or more of certain terms and conditions specified in the section. These include, *inter alia*, (1) the classifying of milk in accordance with its utilization; (2) the fixing, or providing a method for the fixing, of minimum uniform prices for each use classification which all handlers shall pay; (3) the payment of uniform prices to producers irrespective of the ultimate use of their milk; and (4) the adjustment of the payments by handlers in order that the total sum paid by the handler for milk purchased by him shall not be less than the value of the milk at the use classification prices. The Section also stipulates that there are to be no terms and conditions other than those therein described "except as provided in subsection (7)." In this connection

Subsection (7)(D), *infra*, p. 62, authorizes the inclusion of such auxiliary provisions as are "Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order."

2. MILK MARKETING ORDER NO. 27

The New York-New Jersey Milk Marketing Order (Order No. 27) was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in the New York metropolitan marketing area. 3 F.R. 1945, 1957, 2100, 2102.[8] The scheme of the order was examined by this Court in *United States* v. *Rock Royal Co-op., supra,* and several attacks upon its validity rejected. In the course of its opinion, the Court discussed the milk marketing problem in the area covered by the order, with particular reference to the profitability and perishability of fluid milk, the requirements for sanitation, the surplus which results during low consumption periods because of the amounts needed to fill demands during peak consumption periods, the use of surplus for cream, butter, cheese, milk powder and other relatively nonperishable products, the cut-throat competition, and the need for a fair division of the fluid milk market among producers. In 1957, the order was amended to extend the marketing area to Northern New Jersey

[8] Order No. 27 is a part of a joint federal-state program. It is complementary to the New York State Revised Official Order No. 126 (R. 700a) and New Jersey Revised Official Order No. 57-3.

and certain additional areas in New York. 22 F.R. 4643.

In its original form, the order provided for the classification, pricing and pooling of milk that was approved by the health authorities for sale in the marketing area. *United States* v. *Rock Royal Co-op., supra,* 307 U.S. at 549–550; *Titusville Dairy Products Co.* v. *Brannan,* 176 F. 2d 332, 335 (C.A. 3), certiorari denied, 338 U.S. 905. By extensive amendments to the order made in 1945, however, the plan of regulation was changed. 10 F.R. 6156. As it now stands, the order (7 C.F.R. 927.1 *et seq.*; R. 815a *et seq.*) establishes a marketwide pool and requires the classification, pooling and pricing of all milk delivered by "producers" or associations of producers to "pool plants." The pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.[9] The term "producer" is defined as "any dairy farmer whose milk is delivered direct from farm to a pool plant." 7 C.F.R. 927.6; R. 820a.

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk received at the pool plants is classified into three basic categories according to its utilization: Class I (fluid milk), Class II (cream), and Class III (milk products, butter, cheese, etc.). 7 C.F.R. 927.37; R. 838a. Pursuant to the order, the receiving pool plant handlers make monthly reports to the Market Administrator as to

[9] The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 927.25–927.29.

the quantity of milk purchased by them which falls into each of the use classes. 7 C.F.R. 927.50; R. 852a. The Administrator determines the "minimum prices" for each use classification (7 C.F.R. 927.40 *et seq.*; R. 841a) and, from these prices, applied to the reported utilization of all handlers each month, he calculates a "uniform" or "blend" price (7 C.F.R. 927.65 *et seq.*; R. 856a) which is the minimum that each pool plant handler must pay to all his producers on all the milk received by the pool plant from the producers. 7 C.F.R. 927.70; R. 859a.[10]

The Market Administrator maintains a fund known as the "Producer Settlement Fund". 7 C.F.R. 927.75; R. 865a. Each pool plant handler whose average uses place his milk in a higher return category than the average for the market must pay into the Producer Settlement Fund the amount by which the use "value" of his milk exceeds the uniform price required to be paid the producers. Each handler whose use "value" of the milk purchased is less than the uniform blend price required to be paid to the producers is entitled to withdraw the amount of the

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[10] The formula underlying the blend price has been described as follows:

"The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. That amount is decreased or increased by several subtractions or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk." *Grant* v. *Benson*, 229 F. 2d 765, 767 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

difference from the Producer Settlement Fund. Thus, while every producer receives a uniform minimum price for the milk he sells regardless of the use made of it by the particular pool plant handlers to whom he sells, the handlers are required to pay varying amounts geared to the uses which they actually make of the milk. 7 C.F.R. 927.79 *et seq.;* R. 866a; *Grant* v. *Benson,* 229 F. 2d 765, 767 (C.A.D.C.).

As noted, this pooling is applicable only with respect to milk delivered by "producers", as defined in the order, to pool plants. It is not applicable with respect to milk which is delivered by "dairy farmers" to "nonpool plants".[11] Accordingly, handlers who operate nonpool plants are not required to pool their milk under the order, or to pay uniform minimum prices to the dairy farmers from whom they purchase or to the producers in the pool. Since 1945 (when the plan of regulation was changed so as to relate primarily to the handling of milk marketed from pool plants, see, *supra,* p. 8), the order has required nonpool handlers disposing of milk in the marketing area to make "compensatory payments" to the Producer Settlement Fund. Over the years, the compensatory payment provisions of the order have been reviewed by the Secretary of Agriculture and, on occasion, amended in some respects after public hearing. See *infra,* pp. 22–23. Insofar as Class I–A milk (*i.e.,* fluid milk) is concerned, the amount of the com-

[11] A "dairy farmer" is any person who produces milk (7 C.F.R. 927.5; R. 820a); a "nonpool plant" is one which operates primarily outside the marketing area—*i.e.,* while it may dispose of some milk in the marketing area it generally handles milk destined for other areas.

pensatory payment is the difference between the Class I-A and the Class III price—in other words, the difference in value between fluid milk and surplus milk.

It is the validity of these provisions for compensatory payments by nonpool plants which is in issue in this litigation. The provisions of the order concerning the classification, pooling and pricing of milk delivered by *producers* to *pool plants,* and the payments by pool plants into the Producer Settlement Fund, are not challenged.

### 3. THE ADMINISTRATIVE PROCEEDINGS

Petitioners Lehigh Valley Cooperative Farmers, Inc. (Lehigh) and Suncrest Farms, Inc. (Suncrest) operate milk processing plants located, respectively, at Allentown and Bethlehem, Pennsylvania. Both plants distribute milk, in fluid form, in the New York-New Jersey marketing area. While eligible to participate in the marketwide pool as pool plants, which would entail full regulation rather than partial regulation through compensatory payments, they have expressly elected to be treated as nonpool plants (R. 893, 895).[12] Accordingly, they are subject to the com-

[12] Under an August 1, 1957 amendment, a plant with 55% or more of its milk classified as fluid milk had the option of becoming a pool plant rather than a nonpool plant. 7 C.F.R. 927.29(d); R. 831a. Suncrest exercised its option and chose nonpool status. Lehigh changed its operations at about this time so that it did not qualify as a pool plant under the 1957 order (R. 322a).

By amendment effective September 1, 1958, a plant distributing milk in the marketing area and 55% of whose milk is classified as fluid milk automatically is a pool plant and subject to full regulation unless it elects to be a nonpool plant, 23 F.R. 6738; 7 C.F.R. 927.29(d). Under this provision, petitioners elected nonpool status.

pensatory payment provisions of the order with respect to the fluid milk which they ship into the New York-New Jersey area.

On August 1, 1957, petitioners filed petitions with the Secretary of Agriculture, pursuant to Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(15)(A), alleging that Sections 927.83 and 927.84 of the order (7 C.F.R. 927.83, 927.84; R. 879a, 882a), insofar as they required petitioners to make compensatory payments, were not authorized by the Act (R. 9a–23a, 26a–39a). A hearing was held in October 1957 at which witnesses testified, official notice was taken of various public documents, and there were received in evidence extensive portions of the transcript of the administrative hearing on the basis of which Order No. 27 had been amended on August 1, 1957, so as to extend the milk marketing area (while retaining the compensatory payment provisions previously in effect) (R. 240a–280a; 280a–361a). The Hearing Examiner concluded in his recommended decision in both cases, on the authority of *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, that the compensatory payment provisions were invalid (R. 42a–57a, 58a–59a). However, the Judicial Officer, acting on behalf of the Secretary (5 U.S.C. 516b), dismissed the petitions, sustaining the validity of the relevant provisions (R. 86a–116a, 117a–141a).

#### 4. THE JUDICIAL PROCEEDINGS

During the pendency of the administrative proceedings, the United States brought suit against the two

petitioners in the United States District Court for the Eastern District of Pennsylvania, pursuant to Section 8a(6) of the Act, 7 U.S.C. 608a(6), to compel them to comply with the order pending final administrative and judicial disposition of the Section 8c(15) proceedings (R. 165a). The district court entered a temporary injunction directing petitioners to pay the compensatory payments required by Order No. 27 into the registry of the court until termination of the other proceedings, and retained jurisdiction over the cause (R. 189a–193a).

Following the adverse decisions of the Secretary, each of the petitioners filed in the district court a suit for review of the Secretary's ruling, in accordance with Section 8c(15)(B) of the Act, 7 U.S.C. 608c(15)(B), and the two review actions were consolidated with the pending enforcement action. In the district court, as before, petitioners' fundamental contention, based upon *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, was that the compensatory payment provisions were invalid in that they violated the "uniformity" requirement in Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra,* p. 60.

The district court in the instant cases concluded that the compensatory payment provisions were necessary and incidental to the other provisions of the order but, nevertheless, held them to be invalid under the authority of the *Kass* case (R. 210a–231a). On the government's appeal, the Court of Appeals for the Third Circuit reversed, upholding the validity of the challenged provisions (R. 897–906). The court de-

clared that the *Kass* decision had erred in construing Section 8c(5)(A) as requiring that all handlers, pool and nonpool, be guaranteed an equal cost for their milk and that, indeed, such a reading "misconceives the plain language of the section" and, in its effects, "directly conflict[s] with the comprehensive regulatory undertaking of the complete Act as conceived by Congress" (R. 902, 903). Reasoning that Section 8c(5)(A) necessarily has reference only to pool plants, *i.e.*, fully regulated handlers who must pay uniform prices to their producers and account to the Producer Settlement Fund for their utilization of the milk, the court concluded that the section (R. 905–906):

> * * * provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and nonpool handlers. * * * [I]ts only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

Finally, the court ruled that the compensatory payment provisions were authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D), *infra*, p. 62, in that they were "incidental to * * * and necessary to effectuate the other provisions" of the order, and ruled further that the formulation of the provisions

was supported by the administrative record (R. 906).[13]

## SUMMARY OF ARGUMENT

### I

Petitioners complain of the provisions of Order No. 27 requiring them, and other nonpool handlers disposing of fluid milk in the marketing area covered by the order, to make compensatory payments to the Producer Settlement Fund. It is the government's position, upheld by the Court of Appeals, that these provisions are authorized by Section 8c(7)(D) of the Agricultural Marketing Act and, contrary to petitioners' argument, do not conflict with Section 8c(5).

A. Underlying the compensatory payment provisions in Order No. 27 is the necessity—not disputed by petitioners—for a plan of partial regulation with regard to handlers who do only a part of their business in the marketing area and either do not qualify as pool plants or (like petitioners) have elected not to be subject to full regulation as members of the pool. As spelled out by the Secretary of Agriculture in detailed findings (following public hearings with respect to compensatory payments) if left totally unregulated the nonpool handler would have a substantial competitive advantage over the fully regulated pool handlers

[13] In its disposition of the case, the court did not reach the government's alternative contention that, since petitioners elected to be subjected to partial regulation, in the form of the compensatory payments, rather than to full regulation (see p. 11, *supra*), they are estopped from contending that the incidents of that partial regulation are invalid. We are renewing that contention here as an alternative basis for affirmance. See Point II, *infra*, pp. 55–57.

in the sale of fluid milk in the marketing area. This advantage stems partially from the fact that the nonpool handler, unlike the pool handler, is not required by Order No. 27 to pay minimum prices. Additionally, the nonpool handler with a relatively high percentage of fluid milk sales would be able to outbid the pool handler in purchasing milk. This is because, on his sales of fluid milk, the pool handler must make payments into the Producer Settlement Fund and therefore, unlike the nonpool handler, cannot afford to pay his producers much more than the uniform blend price (which is always less than the value of milk destined for use in fluid form). The consequence of the unregulated nonpool handler's advantage would be that nonpool fluid milk sales would displace sales by pool handlers. This would drive down the blend price and severely impair the entire regulatory scheme.

The Secretary considered the various proposals advanced for meeting the problem in the New York-New Jersey marketing area covered by Order No. 27, and selected the provisions for compensatory payments as the only fair and feasible method of partial regulation of the nonpool handler. All of the other solutions offered would have either retained the nonpool handlers' advantage to some degree or would have unduly burdened those handlers. On the other hand, a compensatory payment by the nonpool handler on his fluid milk sales in the pool area—measured by the full difference between the Class I (fluid milk) and the Class III (manufacturing use) prices—has the effect of stabilizing the market and preventing

destructive competition for the fluid milk market. For that differential is precisely the amount which the fully regulated pool handler must pay to the Producer Settlement Fund when he shifts milk from a Class III to a Class I use. This differential, it is true, may put nonpool handlers at a disadvantage in selling fluid milk within the marketing area, but there is no way of putting pool and nonpool operators on a completely equal plane, and the Secretary may properly prefer the pool handlers (and their producers) who are the mainstay of the area's milk supply.

In devising the particular form of regulation, the Secretary has wide latitude. Since neither the necessity for partial regulation of nonpool handlers nor the administrative findings at the foundation of the compensatory payment provisions are disputed, it follows that, absent a conflict with other terms of the Act, the provisions are authorized by Section 8c(7)(D) as "[i]ncidental to * * * and necessary to effectuate" the other provisions of the Act. There is no merit to petitioners' contention, raised for the first time here, that, if it confers such authority, Section 8c(7)(D) represents an unconstitutional delegation of legislative power.

B. Relying upon the majority opinion (Judge Learned Hand dissenting) in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891, petitioners urge that the compensatory payment provisions violate the requirement in Section 8c(5)(A) of the Act that "minimum prices for each use classification which all handlers shall pay * * * shall be uniform". Viewing the uniformity requirement as

necessitating that the actual cost of milk to all handlers in the marketing area be the same, the majority in the *Kass* case reasoned that, because of the compensatory payment provisions, the nonpool handler's total cost for milk sold in fluid form will exceed the Class I (fluid milk) price (to which the court equated the pool handler's total cost) whenever he pays the farmer more than a Class III (manufacturing use) price for the milk.

This construction of Section 8c(5)(A) is not only opposed to the consistent administrative interpretation but also, as the court below held, will not withstand analysis.

First, Section 8c(5)(A) is directed to pool handlers alone—those handlers subject to full regulation—and therefore has no application to nonpool handlers who are regulated only to a partial extent. This is seen from the fact that the regulatory plan contemplated by the Act is a regional one (7 U.S.C. 608c(11)(A)), envisaging a coordinated plan for a particular region. If all nonpool handlers in the country were deemed to be "handlers" within the meaning of Section 8c(5)(A)—as petitioners appear to claim—all such operators and their farmers would become members of a nationwide pool and the regional marketing scheme would be destroyed. Further, under any definition which would make petitioners "handlers" for purposes of the Section, petitioners would perforce become subject to the full regulation which they do not want and which might be unduly burdensome to them. This Court has recognized that the statute permits

a differentiation between classes of handlers in the marketing area.

Second, even if not limited to pool handlers, Section 8c(5)(A) does not require more than that all handlers similarly situated be afforded uniform treatment. Here it is conceded that all nonpool handlers have been treated alike, and that all pool handlers are treated alike.

Third, Section 8c(5)(A) does not require the equalization of the actual costs incurred by the handlers to which the Section applies. Rather, its mandate is simply that the *minimum* prices shall be uniform. There is no statutory proscription against a handler paying more than the minimum price and, therefore, incurring a total cost in excess of that of another handler. And, under Order No. 27, the minimum uniform price for each use classification is the same for pool and nonpool handlers.

Fourth, the compensatory payments are made to the Producer Settlement Fund and not to the farmer and, therefore, are not part of "price". Thus, they do not come, in themselves, within the statutory requirement of uniform minimum *prices*. In actuality, however, compensatory payments do operate to insure the price uniformity called for by Section 8c(5)(A), and therefore further the objectives of that provision of the statute.

Petitioners' alternative argument that the compensatory payment provisions prohibit the entry of milk into the marketing area in violation of Section 8c(5)(G) was not presented in the administrative proceedings and is therefore not properly before the

Court. The contentions of the State of Minnesota in its *amicus curiae* brief which are based upon Section 8c(5)(D) are also precluded since they were not raised at any stage of the administrative or judicial proceedings by petitioners. In any event, neither of these Sections provides an obstacle to compensatory payments.

II

Petitioners are estopped to challenge the validity of the compensatory payment provisions. While the Secretary could have subjected petitioners to full regulation, Order No. 27 gave them the option to select partial regulation as nonpool handlers. Having expressly exercised that option, and obtained the benefits of less than full regulation, petitioners waived any claim that the burdens of partial regulation are invalid.

III

If the provisions of Order No. 27 for partial regulation of petitioners through compensatory payments should fail, petitioners would be subject to full regulation and would have to comply with all of the provisions of the order relating to pool handlers. These latter provisions are severable and there is no question that they may be validly applied to petitioners.

## ARGUMENT

### I

### THE COMPENSATORY PAYMENT PROVISIONS OF ORDER NO. 27 ARE VALID

We submit that the Court of Appeals was clearly correct in its conclusion that the challenged compen-

satory payment provisions of Order No. 27 are valid. As we show first, the administrative record gives firm support to the Secretary's determination that these provisions are essential to the effective operation of the entire regulatory scheme and, as such, are authorized by Section 8c(7)(D) of the Agricultural Marketing Agreement Act, 7 U.S.C. 608c(7)(D), *infra*, p. 62, providing for "incidental" terms and conditions "necessary to effectuate" the other provisions of the order. While petitioners have advanced an alternative formula for computation of compensatory payments, their suggestion was expressly considered and rejected as unsuitable and inadequate by the Secretary—to whom Congress entrusted the task of formulating the appropriate regulatory plan.

Second, we show that the compensatory payment provisions are not inconsistent with the uniformity requirements of the minimum class price provision of Section 8c(5)(A) of the Act, 7 U.S.C. 608c(5)(A), *infra*, p. 60. As the court below recognized, the provisions of Section 8c(5)(A) have no application to nonpool handlers or their obligations. In addition, contrary to petitioners' argument, that Section cannot be read as a Congressional mandate that the costs to all handlers distributing milk in the marketing area be equalized. Petitioners' interpretation not only finds no basis in the language of the Section but cannot be reconciled with the statutory scheme or its underlying purpose.

A. THE COMPENSATORY PAYMENT PROVISIONS ARE AUTHORIZED BY SECTION 8C(7)(D) OF THE AGRICULTURAL MARKETING AGREEMENT ACT AS INCIDENTAL TO AND NECESSARY TO EFFECTUATE THE OTHER PROVISIONS OF THE ORDER

Petitioners' attack is upon the provisions contained in the 1957 amendatory Order No. 27 requiring compensatory payments by nonpool handlers disposing of milk in the marketing area. Section 927.83, 7 C.F.R. 927.83; R. 879a.[14] Compensatory payment provisions were part of Order No. 27 prior to 1957. However, petitioners first became subject to compensatory payments under Order No. 27 when, by the 1957 amendments, the marketing area was expanded to include certain parts of New Jersey served by petitioners.

The Secretary of Agriculture has long deemed it essential that there be a plan of partial regulation for handlers who do only a part of their business in the marketing area. Since 1945—when Order No. 27 was amended to relate primarily to the handling of milk marketed from pool plants (see p. 8, *supra*)—this regulation has taken the form of compensatory payments to a Producer Settlement Fund. During the sixteen years since their inception, the compensatory payment provisions have been amended

[14] As we have noted, p. 12, *supra*, petitioners also challenged, in the administrative proceeding, Section 927.84 of the order (R. 882a). That Section deals exclusively with payments (not regarded as compensatory in character) on milk the source of which is not established. The record does not disclose that petitioners have been called upon to make payments under the Section, and we have been advised by the Department of Agriculture that, in fact, they have not been. Further, petitioners do not address themselves in their brief to this Section. For these reasons, it is unnecessary to discuss it here.

on several occasions. See *e.g.*, 11 F.R. 11120. The entire subject of compensatory payments was extensively considered in 1953. Immediately following the decision in *Kass* v. *Brannan,* 196 F. 2d 791 (C.A. 2), certiorari denied, 344 U.S. 891—invalidating the prior compensatory payment provisions of Order No. 27—the Secretary held a protracted public hearing on proposed amendments with respect to compensatory payments (which were adopted). On the basis of that evidence, the Secretary made detailed findings on the problem and its most acceptable solution. 18 F.R. 8444. And, again in 1957, in connection with the amendments of that year, the subject was considered at a public hearing and additional findings made by the Secretary. 22 F.R. 4207; R. 752a–755a.

Petitioners apparently would disregard the 1953 findings.[15] But in view of the fact that, from the standpoint of petitioners' challenge, the compensatory payment provisions in the 1957 amendments were not changed from those of 1953, the Secretary's findings in both years are of equal relevance. And they clearly establish the need for partial regulation of nonpool handlers who sell in the marketing area—a need which petitioners do not appear to dispute—and also the justification for the particular form of regulation which the Secretary has selected.

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[15] Petitioners objected to the introduction into the administrative record on their review proceeding of the administrative record made at the time of the 1953 amendments, which related to the need for and the appropriate rate of compensatory payments (R. 287a, 293a). The basis of their objection was that they were not attacking the provisions for compensatory payments as they existed before 1957.

1. *a.* The Secretary's findings detail the severe adverse effects which leaving nonpool handlers completely unregulated would have on the regulatory scheme within a marketing area. 18 F.R. 8444–8448; 22 F.R. 4179, 4207–4208 (R. 752a–755a). The nub of it is that, if left unregulated, nonpool handlers would have a substantial competitive advantage over the fully regulated pool handlers in the sale of fluid milk in the marketing area, and the activities of the nonpool handlers would tend to destroy the price structure within the area.

The problem arises because, as explained in the Statement, *supra,* pp. 3–4, there is normally more milk supplied to a marketing area than is needed for fluid purposes, and fluid milk brings the highest prices. The regulatory scheme assures that no pool handler gets an undue share of these higher prices for fluid milk, and that competition for the fluid milk share of the market does not injure the industry as a whole within the area. If the nonpool handlers selling milk in the area were left unregulated, they would have a double advantage in making fluid milk sales and would therefore tend to obtain too large a share of this portion of the market, to the detriment of the pool operators and their suppliers. The nonpool handler, unlike the pool handler, is not required by the order to pay minimum prices to his dairy farmers; he can therefore often afford to sell his fluid milk cheaper than the pool handler. This factor, in itself, tends to place nonpool milk at a competitive advantage over pool milk in the marketing area and to aid nonpool sales to displace pool sales. In addi-

tion, the nonpool operator who has a higher ratio of Class I (fluid milk) sales than the average in the pool would be able to outbid the pool operator in purchasing milk because he can afford to pay his farmers a price based on his own utilization of the milk, rather than the blended price which tends to control purchases by pool operators. The pool handler (who is similarly situated) could not afford to pay a high utilization price to his producers, even though he makes many Class I sales, because he must also meet his obligation to make payments into the Producer Settlement Fund for the benefit of all producers.

The result of these two factors is that, as nonpool fluid milk sales in the marketing area displace sales that otherwise would have been made by pool handlers, pool handlers would be compelled to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to their producers. The effectiveness of the regulatory scheme would be greatly impaired and its purposes frustrated; the return to the farmers selling to pool operators would be lowered and the strong tendency would be for them to break away from pool operations and, in turn, for the injurious conditions of the unregulated era to revive.

The Secretary's solution was to remedy the situation by requiring the nonpool handlers whose interest in the market was tangential,[16] when they sold fluid milk (Class I), to pay a compensatory sum to the Pro-

[16] In most months of the year, a plant which ships more than 25% of its milk for fluid use in the marketing area cannot be a nonpool plant. See 7 C.F.R. 927.29 (a) and (b).

ducer Settlement Fund—in an amount equal to the difference between the Class I and the Class III minimum price—so that the return to the pool producers would not be lowered by these Class I sales by nonpool handlers. The nonpool handler and his farmers (whose sales for the area are normally not their main business) no longer obtain an advantage from being outside the regulatory scheme, and the pool operator and his producers (who are the mainstay of the area's milk supply) are not disadvantaged by the entry of the nonpool operator into the marketing area.

Under Section 927.83 of Order No. 27 (7 C.F.R. 927.83; R. 879a), moreover, no compensatory payments are required "for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of the Class I-A and Class II milk used in such compuation * * *". Unlike the provisions in effect at the time of the *Kass* case (*supra,* pp. 12, 13–14, 23, *infra,* pp. 34*ff*), the provisions here under attack provide for compensatory payments only when there is a displacement of pool milk by nonpool milk. When there is a shortage of Class I milk in the pool, the compensatory payments are not required. Thus, the payments involved in this litigation are compensatory and are not in the nature of a penalty.

*b.* The record also reflects that the Secretary gave careful consideration to the various proposals advanced at the rule-making hearings for meeting this problem and, for the reasons developed in his findings, selected the present provisions as the only fair and feasible solution. 18 F.R. 8449–8450; 22 F.R. 4207–

4208; R. 752a–755a. For example, the Secretary rejected the alternative of mandatory full regulation of nonpool handlers in petitioners' situation [17] on the ground that such regulation would be likely to burden them unduly and place them at a substantial competitive disadvantage with regard to other nonpool handlers in the sale of milk in unregulated areas. 22 F.R. 4207–4208; R. 753a–754a.

Similarly, the Secretary expressly considered petitioners' suggestion, advanced in the petition for certiorari (p. 16), that the formula for computing compensatory payments should be based on the actual cost of the milk to nonpool handlers, rather than on the class minimum prices. For reasons developed at length in the findings, this was found not to be a suitable or adequate measure. 18 F.R. 8449. A basic objection to such a formula is that it would enable nonpool plants—which, in the milkshed supplying the New York-New Jersey market, operate side by side with pool plants—to outbid pool plants in buying milk, and thus to give an advantage to farmers supplying nonpool operators. That effect is most evident in the case of a handler who pays his farmers on the basis of an individual handler pool (as do handlers, like Lehigh, subject to the Philadelphia marketing order)—*i.e.*, a blend price based on the particular handler's own utilization, not on the average of all handlers' utilizations. Such a handler could account to his own farmers at the full Class I

[17] Such full regulation has been held permissible. *Tituscille Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), certiorari denied, 338 U.S. 905. See *infra*, pp. 57–59.

price for any fluid milk sold in the New York-New Jersey marketing area and thereby avoid making compensatory payments to the New York-New Jersey fund. By availing himself of the New York-New Jersey market to increase his percentage of fluid milk sales above the average of the marketwide pool, he could thus increase the payments to his own farmers (based on his own uses) above the uniform blend price paid producers supplying pool plants (based on marketwide pool utilization). His farmers would gain and maintain an advantage over the farmers whose main business is supplying the New York-New Jersey area.

Necessarily, "[t]he system of compensation payments [in the various Federal milk marketing orders] varies * * * with the local economic circumstances." *Study of the Dairy Industry,* Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., p. 63. Thus, under other conditions, different provisions might suffice to prevent nonpool handlers from having an undue competitive advantage. For example, where, in less complex milksheds, pool and nonpool handlers are geographically separated and are not in competition for farmers, the ability of nonpool handlers to pay their farmers more than pool handlers may be less significant. Because of differences of that kind, a particular provision—*e.g.,* permitting nonpool handlers to account to their farmers on an individual pool basis and account to the marketwide pool only for any difference—may be appropriate for some areas but

not for others. See *e.g.*, the order for upstate Michigan, 7 C.F.R., Part 916, § 916.84.

The concern of the Secretary here, of course, was confined to the conditions prevailing in the New York-New Jersey marketing area. On the basis of those conditions, he concluded that the only compensatory payment that can avoid the problem presented by the disposition of nonpool milk in the marketing area is one measured by the full difference between the Class III and Class I prices. That difference is exactly the additional amount for which a fully regulated pool handler must account to the Producer Settlement Fund whenever he shifts milk from a Class III use to a Class I use. It is largely that aspect of the order—the handler's accountability to the fund is always greater by the Class III-Class I differential when he sells milk for Class I uses than when he sells it for Class III uses—that stabilizes the market and prevents destructive competition for the Class I market. Unless the nonpool handler is faced with the same cost differential in choosing between Class III sales and Class I sales in the marketing area, he has an incentive to undercut the market, if necessary, in order to convert his otherwise Class III sales into Class I sales.

It is true that the compensatory payment requirement may very well work to the disadvantage of the nonpool operator in selling fluid milk within the marketing area—for any milk purchased at more than the Class III minimum price his total cost will be more than the Class I minimum price—but, as the

Secretary found, there is no workable means of putting pool and nonpool operators on a plane of absolute equality. It is the pool operator and his producer who produce primarily for the marketing area, and when a choice has to be made it is not unfair to protect them as against the nonpool operator and his farmers whose interests in the marketing area are normally peripheral.

2. *a.* In light of the findings of the Secretary—which petitioners do not (and cannot) challenge as lacking support in the evidence adduced at the hearings—the courts below were clearly correct in their conclusion that, absent a conflict with other terms of the Act, the compensatory payment provisions are authorized by Section 8c(7)(D) of the Act, 7 U.S.C. 608c(7)(D) (App., *infra*, p. 62) as "[i]ncidental to * * * and necessary to effectuate the other provisions" of the order. See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72–73 (N.D. Ohio). Indeed, the conclusion below would be required even if it could be said (contrary to the Secretary's determination) that one or more of the alternative proposals would also have been adequate and suitable.

In devising the particular form of regulation, the Secretary necessarily has wide discretion. "A variety of plans * * * may well conform to the statutory standards. But the choice among permissive plans is necessarily the Secretary's; he is the agency entrusted by Congress to make the choice." *Secretary of Agriculture* v. *Central Roig Co.*, 338 U.S. 604, 614. See also *Stark* v. *Wickard*, 321 U.S. 288, 310; *Mitchell* v. *Budd*, 350 U.S. 473, 480; *Queensboro Farm Prod-*

*ucts* v. *Wickard,* 137 F. 2d 969, 977 (C.A. 2). Given the necessity of some partial regulation of nonpool handlers, no objection can be made that the plan adopted is not essential to the effective operation of the entire regulatory scheme simply because the Secretary could have selected other means— so long as the plan selected is fair and does not contravene other parts of the Act.

*b.* The "other provisions" of the order to which the compensatory payment is "incidental" and which it is "necessary to effectuate" are those establishing the pool system and the Producer's Settlement Fund. As petitioners admit, those provisions of Order No. 27 are fully authorized by Sections 8c(5) (A), (B), and (C), of the Act, *infra,* pp. 60–61. Paragraphs (A), (B), and (C) are interrelated parts of the statutory scheme, and together provide the authority for the establishment of milk pools: (A) provides for the payment by handlers of the prescribed minimum prices for their actual utilization of milk (*i.e.,* the "use" price); (B) provides for the payment to producers of a uniform price regardless of use (*i.e.,* the "blend" price); and (C) authorizes the establishment of the equalization fund needed to effect the accountings required by (A) and (B) (*i.e.,* the Producer Settlement Fund). Since this statutory scheme of regulation contemplates a market-wide pool, devices which are useful in maintaining the pool in proper working order are authorized by Section 8c(7)(D). The compensatory payment is just such a device. See, also, *infra,* pp. 49–52.

*c.* Contrary to petitioners' contentions (Br. 43–47), this Court's decisions in *Brannan* v. *Stark,* 342 U.S. 451, and *United States* v. *Rock Royal Co-op.,* 307 U.S. 533, do not call for a different conclusion. In *Brannan* v. *Stark, supra,* the Court held that the Act did not authorize provisions permitting deductions from the Producer Settlement Fund for payments to producers' cooperatives. The Court found that such deductions were not justified by the record, and pointed out further that Congress had expressly limited deductions in Section 8c(5). In contrast, the compensatory payments in issue here are, as we have shown, justified by the record. Cf. *Grant* v. *Benson, supra.* Moreover, the payments represent a form of partial regulation not expressly authorized or prohibited by the basic authorizing provisions of Section 8c(5), yet both "incidental" and "necessary" to the effectiveness of the basic scheme and within the contemplation of Section 8c(7)(D). The decision in *United States* v. *Rock Royal Co-op.,* 307 U.S. at 575–576, in which this Court stated that, "[w]hile considerable flexibility is provided by § 8c(7)(D), it gives opportunity only to include provisions auxiliary to those definitely specified," similarly gives no support to petitioners. The compensatory payment provisions are, as we have shown, auxiliary to the minimum price and pool provisions specified in the Act.

*d.* Petitioners also contend (Br. p. 47) that, if it authorizes the compensatory payment provisions, Section 8c(7)(D) embodies an unconstitutional delegation of legislative power. This contention was not raised in the courts below and, accordingly, is not

properly before this Court. In any event, it is without merit.

In discussing the delegation of authority to the Secretary in the Act, this Court, in *Rock Royal,* found no constitutional difficulty with the "opportunity" given him in Section 8c(7)(D) "to include provisions auxiliary to those definitely specified" in Section 8c(5). As it noted at an earlier point in the opinion (307 U.S. at 574):

> From the earliest days the Congress has been compelled to leave to the administrative officers of the government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied. In dealing with legislation involving questions of economic adjustment, each enactment must be considered to determine whether it states the purpose which the Congress seeks to accomplish and the standards by which that purpose is to be worked out with sufficient exactness to enable those affected to understand these limits. Within these tests the Congress needs specify only so far as is reasonably practicable. The present Act, we believe, satisfies these tests.

As we have stressed, the compensatory payment provisions are "auxiliary" to the provisions specified by Section 8c(5). Applying the "necessary to effectuate" standard of Section 8c(7)(D), the Secretary has

found that these provisions are essential to the effective operation of the entire regulatory scheme. The standard is as specific as "is reasonably practicable" and it was properly applied.

B. THE COMPENSATORY PAYMENT PROVISIONS ARE FULLY CONSISTENT WITH SECTION 8c(5) OF THE ACT

The central point of petitioners' attack upon the compensatory payment provisions is the requirement in Section 8c(5)(A) that "minimum prices for each such use classification which all handlers shall pay * * * shall be uniform as to all handlers." App., *infra*, p. 60. While petitioners admit (Br. p. 16) that nonpool plants are subject to regulation, and do not challenge the adverse effect of sales of fluid milk by nonpool handlers in the marketing area covered by Order No. 27, they nevertheless insist that this uniformity requirement precluded the Secretary from adopting the only plan of partial regulation which he found to be acceptable. As petitioners read the Act, Congress drastically restricted the ability of the Secretary to ameliorate the disorderly marketing conditions which prompted the enactment of the statute.

Petitioners rely mainly on the Second Circuit's decision (Judge Learned Hand dissenting) in *Kass* v. *Brannan*, 196 F. 2d 791, certiorari denied, 344 U.S. 891, in which it was held that the then compensatory payment provisions of Order No. 27 were in violation of the Act. The majority viewed the requirement of Section 8c(5)(A) that minimum prices be uniform as, in effect, necessitating that the actual *cost* of milk to all handlers distributing in the marketing area be

the same. The court reasoned that, under the provisions for compensatory payments, a nonpool handler would have higher costs than a pool handler because the latter's cost is equal to the class price of the milk while a nonpool handler's cost consists of both the amount paid to the dairy farmer and the amount of the compensatory payment. Since the compensatory payment is the difference between Class I and Class III prices, the nonpool handler's total cost exceeds the Class I price for fluid milk whenever he pays the farmer more than a Class III price for milk.

This view of Section 8c(5)(A) is, of course, directly opposed to the long-standing interpretation of the Section by the official charged with its administration, an interpretation which is entitled to great weight. *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 90; *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315; *United States* v. *American Trucking Associations*, 310 U.S. 534, 549.[18] Further, as the court below perceived, the

[18] It is worthy of note that the administrative practice of including compensatory payment provisions in milk orders was fully explained to Congress. *Study of the Dairy Industry*, Hearings before the Subcommittee on Dairy Products of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Sess., pp. 1–31. While the hearings occurred after *Kass* v. *Brannan* was decided, it was made clear to the subcommittee that compensatory payment provisions were being continued in milk marketing orders. *Id.* at pp. 31, 63, 65, 67 *et seq.* Neither at that time nor subsequently was there any legislative suggestion that the provisions should be deleted.

reasoning of the majority in the *Kass* case, urged by petitioners here, will not withstand analysis.[19]

1. *Section 8c(5)(A) applies only to pool plants and is inapplicable to nonpool plants*

The first premise upon which petitioners necessarily proceed is that Section 8c(5)(A) and its uniformity requirement apply to pool and nonpool handlers alike. This premise was rejected—we think correctly—by the court below, as well as in *Lawson Milk Co.* v. *Benson,* 187 F. Supp. 66 (N.D. Ohio), now pending on appeal to the Court of Appeals for the Sixth Circuit.[20]

*a.* Order No. 27 establishes a regional marketing area, sets up a pool for the area, and designates who are within the area and pool—*i.e.,* the pool handlers and the "producers". Additionally, the order defines the term "producer" as "any dairy farmer whose milk is delivered direct from farm to a pool plant."

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[19] While perhaps not directly pertinent to the present case, it might be mentioned in passing that, even if the *Kass* analysis of the uniformity requirement in Section 8c(5)(A) were correct, the *result* in that case would still be erroneous. As the court below pointed out (R. 903, n. 5), *Kass* involved sales from one handler to another, while Section 8c(5)(A) is limited to handler-producer transactions. In these circumstances, there was no warrant for the Second Circuit's undertaking to construe the uniformity requirements.

[20] In *Lawson*, the district court held that compensatory payment provisions in the Cleveland milk order like those here involved were valid, expressing its disagreement with *Kass*. As noted in our memorandum in connection with the petition for certiorari in the present case (p. 21), the Sixth Circuit has stayed proceedings on the appeal pending the outcome of this case.

See p. 8, *supra*. Under this definition, nonpool handlers do not purchase their milk from "producers," and the requirement of Section 8c(5)(A) that the minimum prices "for milk purchased from producers or associations of producers" be uniform is in terms of the order inapplicable to them. Further, as it is only with respect to the milk of "producers" that minimum prices must be paid under the order, nonpool handlers have no obligation to pay minimum prices.

This pattern of the order follows the statutory prescriptions and accords with their provisions. The regulatory plan contemplated by the Act is a regional one. Section 8c(11)(A), 7 U.S.C. 608c(11)(A), *infra*, pp. 62–63, provides for marketing orders limited to regional production or marketing areas. Section 8c (11)(C), 7 U.S.C. 608c(11)(C), *infra*, p. 63, authorizes different terms for the different production areas and marketing areas. Section 8c(5)(G), 7 U.S.C. 608c(5)(G), *infra*, p. 62, also contemplates separate marketing areas. For its part, Section 8c(5) as a whole provides the method for implementing the marketing of milk in the regional marketing area, by means of a milk pool, and applies, therefore, to those belonging to the pool in the designated area.

It was this factor of regional marketing that led to the conclusion of the court below that Section 8c(5)(A) was directed to pool handlers only and that the Secretary appropriately defined "producers"

in terms of those farmers delivering their milk direct to pool plants. As the court observed (R. 905–906):

> This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend price to producers and must account to the Producers Settlement Fund for their actual ultilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their ultilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution.
>
> The aim of Section 8c(5)(A) in this control pattern is certain. It provides the foundation upon which the Secretary of Agriculture charges the pool handlers in the marketing area with their actual utilization of the milk despite the fact that under Section 8c(5)(B), they pay the producer the uniform blend price. It in no way dictates equalized costs between pool handlers or between pool and non-pool handlers. This provision, coupled with the Producers Settlement Fund provides part of the mechanism to achieve the ultimate goal of the Act,

> stabilizing the producers market on the regional level. Consonant with that salutary, carefully wrought design, its only valid construction is that its application is limited to all pool or fully regulated handlers for the regional marketing area to determine the accountability of those handlers to the pool.

In short, the Congressional mandate in Section 8c (5)(A) that the minimum prices to be paid by handlers must be uniform was designed to apply within a regional marketing area only to the extent that the area was fully regulated under the statute and only to those handlers who were fully regulated. Operators not within the plan of regulation, but only peripherally affected, were not to be within the statutory provision.

*b.* Our position is fortified by a consideration of the consequences that would flow from regarding petitioners as "handlers" purchasing from "producers", within the meaning of Section 8c(5)(A). The result would be either to destroy the regional character of milk regulation or to compel the Secretary to include all operators, including those like petitioners, within the full plan of regulation for a regional marketing area.

If "producer" means all dairy farmers in the country (as petitioners seem to suggest, (Br. p. 39)), not only petitioners but every other handler in the United States would be a "handler" purchasing from a "producer". Under that view, the uniform minimum price (and other) provisions of Section 8c(5)(A) would come into operation for all the farmers

and all the handlers throughout the country, wherever milk was purchased and wherever it was marketed. The result would be that the uniform minimum price would necessarily have to have a nation-wide coverage—since the price has to be uniform for "all handlers"—and there would have to be a nation-wide pool, rather than regional ones. There would no longer be the regional marketing areas called for by Section 8c (11) of the Act and no possibility of setting different prices for the use classifications in the different areas or different blend prices for the producers in each area pool.

On the other hand, if "producer" were read as applying to all farmers (whether they sell to pool plants or not) selling to handlers who dispose of milk in the marketing area, petitioners (and all similarly situated handlers) would likewise be obligated to comply with the provisions of Section 8c(5)(A) and pay, to all of the dairy farmers who supply them, the uniform blend price provided for in Section 8c (5)(B), *infra*, pp. 60–61. This would make petitioners and their farmers an integral part of the pool. Pool membership, and the full regulation which goes with it, is, however, precisely what petitioners sought to avoid when they elected not to be pool plants.

In short, the Secretary's definition of "producer" in Order No. 27 (under which petitioners are not "handlers" for the purposes of 8c(5)(A)) both preserves the regional marketing scheme and enables petitioners to escape the full regulation which they do not want and which the Secretary found might be unduly burdensome to handlers in petitioners'

situation. See p. 27, *supra*. The broader definitions, which would include nonpool handlers within the scope of 8c(5)(A), would fail in this respect. Judge Learned Hand recognized this factor in his dissent in the *Kass* case (196 F. 2d at 800):

> The provisions in suit can indeed be deemed "inconsistent" with this [§ 8c(5)(B) of the Act], if one reads "all producers" to include "non-pool" producers, for the differential is not paid to the "non-pool" producers; and indeed, even if it were, it would not make the price paid to such a producer the same price as that paid to other producers. However, it is apparent that such producers were not intended, for if they were, "non-pool" producers whose milk came into competition with a "pool" would be automatically included in the "pool".[21]

*c.* It does not run counter to the general scheme of the Act to interpret it as permitting such differentiation among dairy farmers supplying milk to a marketing area, and among different classes of operators in that area. This Court has acknowledged that the Act permits the Secretary to differentiate among dairy farmers. *H. P. Hood & Sons* v. *United States*, 307 U.S. 588, 597–599. And in *Bailey Farms Dairy Co.* v. *Anderson*, 157 F. 2d 87, 92–93 (C.A. 8), certiorari denied, 329 U.S. 788, the court approved the regulation of milk marketing based on separate

[21] In another context, this Court has rejected an overly literal reading of the statute which would lead to an absurd result or frustrate the policy and plan of the Act. See *United States* v. *Rock Royal Co-op.*, *supra*, 307 U.S. at 580 ("purchased" construed to mean "acquired for marketing").

groupings of "producers" and upheld provisions designed to encourage the use of locally produced milk in preference to milk from outside "producers." It is also significant that, in the *Rock Royal* case, the Court upheld Order No. 27 against an attack based on the fact that handlers who sold some of their milk in the New York area were subject to a uniform price for that milk, but not on the milk sold outside the marketing area. The Court found nothing objectionable in this treatment despite the result that for this class of handlers the total costs for milk and the average prices for the separate classes of milk were different from those of other milk handlers who sold in the marketing area.

There is, we think, a strong analogy between the nonpool milk involved here and the unpriced milk in *Rock Royal*. The nonpool milk is unpriced in terms of the Order's provisions for pooling and pricing of pool milk.[22] Just as the "priced" milk in *Rock Royal* was treated differently from the "unpriced" milk, so here the "pool" and "nonpool" milk may receive separate treatment. In *Rock Royal,* this result was reached even though the same handler sold both the priced and unpriced milk and even though his total costs were different from those of other handlers who were required to include all their milk under the order. The Court did not find that the statute required uniformity of prices or costs between

[22] That the nonpool milk may be in another pool, in another area, as that of Lehigh, under Philadelphia Order No. 61, does not affect its status as nonpool milk in the New York-New Jersey area.

the handlers who sold all their milk in the area and those who sold only some milk in the area. There is no reason why it should find otherwise, in the comparable circumstances here.

*d.* We submit that the matter comes down to this. Petitioners concede (Br. p. 42) that nonpool plants are not wholly excluded from regulation or supervision. If subject to regulation, they must be treated the same as pool plants or differently. If not permitted to be treated differently, as petitioners claim, it follows that they must be treated the same, which means that they must be fully regulated as pool plants. But petitioners do not wish to become pool plants and do not seek uniform treatment with pool plants. They have chosen to be nonpool plants (R. 893, 895) because, apparently, nonpool status is more advantageous to them than pool status (R. 273a–276a). They are not being harmed or discriminated against but are benefited by being subject to the compensatory payments rather than to full regulation; and the compensatory payment device has a rational basis consonant with the statutory plan. Petitioners' claim that pool handlers are favored over nonpool handlers, in violation of the uniformity requirements of Section 8c(5)(A), is thus shown to be without merit on petitioners' own assumptions.

2. *If Section 8c(5)(A) applies to nonpool plants, it requires only uniformity among handlers in the same situation*

As shown above, the phrase "all handlers" in Section 8c(5) does not mean "all handlers in the country" or "all handlers selling in the marketing area";

that reading would destroy the entire scheme of regional marketing areas or else render petitioners full members of the pool subject to full regulation. For that reason, we believe (as argued immediately above) that the uniformity requirement in Section 8c(5) affects only pool plants. If not limited to pool members, however, the uniformity requirement must refer to all handlers *who occupy the same position.* Uniformity is normally observed by proper classification, under which the rule applies to all persons similarly situated. *Fernandez* v. *Wiener,* 326 U.S. 340, 359–360; *Patton* v. *Brady,* 184 U.S. 608, 622–623. See also, *Nicol* v. *Ames,* 173 U.S. 509, 521, where this Court said: "If the classification be proper and legal, then there is the requisite uniformity in that respect."

There is no claim that nonpool handlers have been subjected to diverse treatment or prices, or that pool handlers have not been treated uniformly. In fact, petitioners admit (Br. p. 18) that all handlers *similarly situated* are treated alike. Accordingly, whatever uniformity is required under Section 8c(5)(A) has been accorded to all handlers. Cf. *Green Valley Creamery* v. *United States,* 108 F. 2d 342 (C.A. 1), where the court upheld, against an attack based upon the uniformity requirement of Section 8c(5)(A), provisions of a milk marketing order which established two sets of minimum prices, one applicable where the purchase was from an association of produc-

ers and the other controlling purchases from producers who were not members of an association.[23]

3. *Section 8c(5)(A) prescribes minimum prices rather than equal prices or costs*

Petitioners, and the Second Circuit in the *Kass* opinion, also proceed on the premise that, as to the handlers to which it applies, Section 8c(5)(A) requires the equalization of the actual *costs* incurred by them for their milk. This postulate is likewise unsound.

In the requirement in Section 8c(5)(A) that "[S]uch prices shall be uniform as to all handlers", the word "such" refers to the preceding words, "*minimum* prices for each such use classification which all handlers shall pay". (Emphasis added.) Petitioners appear to overlook the fact that a minimum price sets a *floor* but not a *ceiling* and that minimum is not the equivalent of "equal" or "same". There is no statutory proscription against a handler paying more than the minimum price. See *Stark* v. *Wickard*, 321 U.S. 288, 291: "[T]he Act * * * does not forbid sales [by producers to handlers] at prices above the minimum." Handlers in the pool may well pay more than the blend price to their producers (R 786a *et seq.*) but their payments into, or withdrawals from, the Producer Settlement Fund are computed, nevertheless, on the basis of the difference between the minimum use classification price and the blend price.

[23] See also, *Adams* v. *Milwaukee*, 228 U.S. 572, where this Court upheld a regulatory scheme which accorded different treatment to milk shipped into the city than was accorded to milk drawn from cows within the city.

If one pool handler may thus have a higher *cost* than another pool handler without violating the requirement for *minimum uniform prices* for use classifications and a uniform price to the producers, it follows, *a fortiori*, that a nonpool handler may also have a higher cost than a pool handler without such a violation.

In actual fact, nonpool handlers' costs cannot be equalized to pool handlers' costs since the latter are so disparate. Costs of milk vary depending on the demand, supply, season, bargaining power of the handler, and other factors. The objective of the Act is to fix *minimum prices* for the sale of milk by producers, to be effected by fixing a uniform blend price for the producers in the pool for a designated area. The Act does not require equal *costs* to handlers; there is no reference at all in Section 8c(5) to the "cost" to handlers.

Further, the minimum uniform price, provided in Section 8c(5)(A), refers to the price for each use classification. There is no complaint by petitioners that the use classification price employed for pool handlers was different for nonpool handlers.[24] The attack is levelled instead against the method of application of the use classification price in determining the amount of compensatory payments. What petitioners object to is the fact that the nonpool

[24] Of course, the requirement for uniformity of price does not apply to compensatory payments into the Producer Settlement Fund nor, indeed, to any payments into the fund. Even the payments of pool handlers into the Fund differ, depending on their uses of the milk.

handler is not credited with his actual cost (because the Secretary found that the allowance of such a credit would not protect the marketing area or the minimum price to producers in the pool, see pp. 27–28, *supra*). But since the use classification prices remain uniform and the statute is silent as to equalization of costs, there has been no violation of Section 8c(5).

On the question of uniformity of costs, this Court has already observed that there is no requirement for a uniform price for each unit of milk purchased by a handler nor for uniformity of the average price each handler pays for all the milk purchased. *United States* v. *Rock Royal Co-op., supra,* 307 U.S. at 566. Also, the Secretary has found that it is administratively impossible in most cases to determine what was the actual rate of payment to farmers for that part of the nonpool milk which the nonpool handler distributed in the marketing area, as distinguished from the price paid for that part which was disposed of elsewhere or for other than fluid purposes. See 18 F.R. 8449–8450.

In this connection, it is significant that the compensatory payments required under Order No. 27 do not increase the costs to Lehigh for the milk it sells in the area covered by that order. This is because Lehigh gets credit in its own pool (under Philadelphia Milk Marketing Order No. 61) for the compensatory

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payments made into the Order No. 27 Producer Settlement Fund (R. 97a).[25] Under the Philadelphia Milk Marketing Order, the milk it disposes of in the area of Order No. 27 is priced at Class I–A less the compensatory payment it makes under Order No. 27. In other words, by the combined operation of these two orders, Lehigh's total required minimum payment for its milk is in effect the Class I–A price under Order No. 27; the compensatory payment is canceled.[26] In these circumstances, Lehigh's complaint is, in substance, that it is not permitted to make the payments to its own farmers but make the payments to the fund for the benefit of the producers in the Order No. 27 pool. But this Court has ruled that a handler has no standing to complain of the disposition of moneys among the farmers. *United States* v. *Rock Royal, supra,* 307 U.S. at 561. Cf. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 347.

4. *Compensatory payments are not part of "price" and therefore are not within the statutory requirement for uniform prices*

A compensatory payment is not paid to the farmer or seller of the milk and is not part of

[25] Suncrest is not subject to another milk marketing order and does not have this advantage. However, the compensatory payments are less costly to it than would be payments to the Producer Settlement Fund as a fully regulated pool plant.

[26] Under Order No. 27, Lehigh pays a compensatory payment amounting to the difference between Classes I and III. Under the Philadelphia order, Lehigh's milk sold in the New York-New Jersey area is priced at the Class I–A price *less* the compensatory payment. What is paid under Order No. 27 is subtracted under Order No. 61.

"price". As we have shown, it is paid to obviate the competitive disadvantage that pool handlers would otherwise suffer; to protect the orderly market condition which the Act is designed to achieve; to protect the price to the producers in the pool; and to stabilize the market and prevent destructive competition (18 F.R. 8448, 22 F.R. 4207–4208) (R. 752a–755a). It is to compensate the producers in the pool for the displacement of pool plant fluid milk sales, and to restore to the Producer Settlement Fund the sums by which it becomes depleted because of sales of fluid milk by nonpool plants in the pool area. These sales force pool plant fluid milk into surplus use (*i.e.*, milk products) and, in turn, lower the uniform price to pool producers for pool milk because the pool receipts represent a lesser quantity of milk as well as a lower classification of milk. See the discussion, *supra,* pp. 24–31.

As stated by Judge Learned Hand in his dissenting opinion in the *Kass* case (196 F. 2d at 799):

> The provisions in suit do not do that [*i.e.*, fix a minimum "price" for milk purchased from "producers"]; they fix no prices "for milk purchased from producers" at all, if by "price" is meant the money that eventually goes to producers in payment for their milk. The differential exacted from a "non-pool" handler is not the "price" of anything; moreover—for whatever that may be worth—it is collected "to accomplish the purposes" of assuring "minimum prices" for milk delivered by producers, § 8c(5)(C) * * *

Payments made to producers' cooperatives for marketwide services have been held to be necessary to effectuate the provisions of the marketing order, and have been held not to interfere with the price uniformity requirements of the Act. *Grant* v. *Benson,* 229 F. 2d 765 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The payments there, as in this case, are not part of the uniform price designated in the statute, but are payments devoted to insuring that the policy of the Act and the order implementing it are carried out and that the uniform price to producers shall not be undermined.

5. *Compensatory payments insure the uniformity of price required by section 8c(5)(A)*

Lastly, when the compensatory payment provisions are related to the function they serve, it becomes clear—as we have already suggested—that in actuality they insure the price uniformity dictated by Section 8c(5)(A), rather than derogate from it.

As we have pointed out, without compensatory payments the Act's provisions for marketwide pooling of milk, for establishing orderly marketing conditions, and for maintaining a minimum price to producers would be frustrated. The testimony at the promulgation hearing was to the effect that "market pool orders with classified price plans cannot be continued without [compensatory payments]" (R. 392a–393a). The payments are designed to stabilize the relationship between handlers and producers of pool milk and handlers and producers of nonpool milk with respect

to sales in the marketing area. They make it impossible for a handler operating outside the marketing area to dispose of his surplus milk within the area in such a way as to impose the financial burden of the surplus on producers in the marketwide pool (R. 752a). Conversely, they restore to producers in the area of Order No. 27 the benefit of fluid sales displaced by the nonpool handlers' milk. No undue hardship rests on the nonpool handlers who, if they had not marketed the fluid milk in the Order No. 27 area, would normally have had to market it in their own area for a surplus use (*i.e.,* milk products) (R. 394a). It is the differential between the surplus use (Class III) and the Class I use which must be maintained to stabilize the market and prevent destructive competition for fluid milk sales.

In any event, pool producers carry the burden of reserve supply for the marketing area and should have the benefit of the value of the fluid milk sales in the area they regularly supply. It is essential to protect those farmers who are engaged in production of a supply of milk which is primarily produced for and always available for use when needed in the marketing area. Otherwise the money paid by consumers for fluid milk would in part be distributed among farmers delivering milk to plants which do not constitute a part of the regular and dependable supply of milk for the market. Consumers as well as producers would be hurt since the money intended for the pool producers to enable them to produce an adequate and dependable supply of pure milk for the particular marketing area would be lost through dis-

tribution to farmers only incidentally or intermittently engaged in supplying milk to this area 18 F.R. 8447; 22 F.R. 4207–4208 (R. 216a, 752a–755a).

In sum, the findings of the Secretary, on the basis of the extensive evidence with regard to the 1953 and 1957 amendments (R. 361a–696a; 697a–814a; 889–892), fully support the provisions for compensatory payments, not only as to their necessity to avoid frustration of the purposes of the Act and the provisions of the order, but also as to the propriety and effectiveness of the rate of payment for insuring the uniformity and level of prices required by the Act.

6. *The provisions do not violate Section 8c(5)(G)*

Petitioners' argument (Br. 47) that the compensatory payment provisions prohibit the entry of milk into the marketing area, in violation of Section 8c(5)(G) of the Act, *infra*, p. 62, is not properly before the Court as it was not presented in the administrative proceedings. *United States* v. *Ruzicka*, 329 U.S. 287, 292–294; *La Verne Co-Op. Citrus Assn.* v. *United States*, 143 F. 2d 415 (C.A. 9). In any event, it is without merit.

The compensatory payment provisions are applicable to nonpool handlers generally, regardless of *location*, and thus do not prohibit or even limit the marketing of milk "produced in any production area in the United States", within the meaning of Section 8c(5)(G). Milk from any production area may be in the pool or may be sold in the pool area as nonpool

milk. And, in fact, petitioners have continued and may continue to sell milk in this area.

Petitioners' complaint is, in effect, that the payments make it *unprofitable* for them to market milk in the New York-New Jersey area. Even if true, this does not mean that petitioners or any other non-pool handler are "prohibited" from marketing milk in the New York-New Jersey area. Leaving aside the fact that there is no prohibition in the order against milk produced outside the marketing area, compensatory payments are, after all, but one element of the handler's cost. Other elements include the amount paid the farmers who supply him, transportation expense, and overhead. Whether, in the particular case, milk can be profitably disposed of in the marketing area does not depend upon the compensatory payment alone. Rather, from a cost standpoint, the profit margin is controlled by the combined effect of all of these factors. In short, Order No. 27 is not *per se* the cause of petitioners' purported inability to sell milk in the marketing area at a profit.

Congress did not intend to forbid all protective measures which might, because of economic conditions in the market, result in some lessening of the amount of the milk which might have entered the marketing area in the absence of such protective measures. See dissenting opinion of Judge Learned Hand in the *Kass* case, 196 F. 2d 791, 800; *Bailey Farm Dairy Co.* v. *Anderson,* 157 F. 2d 87, 96–97 (C.A. 8), certiorari denied, 329 U.S. 788. In fact, Section 8c(5)(G) is carefully confined, in the case of milk itself, to *prohibitions* on marketing within the area of milk

produced elsewhere; there is no bar whatever, in the case of milk (as distinguished from milk products), to *limitation* of the marketing of outside milk. Since a "prohibition" involves the complete stoppage of all entry of milk from outside, and petitioners do not contend that the compensatory payment provisions completely preclude the entry of all such milk, it is clear that Section 8c(5)(G) has no application in this case.

Finally, it is worth noting that, since the nonpool handler has the option to join the pool and avoid the compensatory payments, it is not Order No. 27 but petitioners' own choice which brings the challenged provisions into operation. The order does not itself bar any milk from entering the area.

*7. Section 8c(5)(D) does not preclude compensatory payment provisions*

In its brief as *amicus curiae*, the State of Minnesota contends (p. 49) that Section 8c(5)(D), *infra*, p. 62 is the exclusive method provided by the Act for dealing with the competition of milk obtained from farmers who are not in the marketing pool. This contention was not advanced by petitioners in the administrative proceedings or in the courts below; and, indeed, is not urged by them in this Court. For these reasons, it is likewise not properly before the Court.

It might be noted, however, that there is no substance to the contention. Section 8c(5)(D) is, in terms, concerned only with "new producers", *i.e.*, farmers who are entering the pool. It permits (but does not require) the Secretary to place such pro-

ducers under a temporary handicap—the milk order may provide (although it need not) that for a period of two months payments to them for milk purchased by pool handlers shall be made at the price for the lowest use classification. Thus, the subsection has no relation to nonpool handlers (like petitioners) who elect not to be in the pool, or to dairy farmers who are neither in the pool nor seeking to enter it.

Moreover, there is a substantial reason why Congress deemed it necessary to authorize expressly the inclusion of a "new producer" provision. Section 8c(5)(B), *infra*, pp. 60–61, requires that all producers delivering milk to handlers in a pool be paid uniform prices. Thus, in the absence of the explicit exception in Section 8c(5)(D), it would not be possible for the Secretary to provide in a milk order, where he thinks it desirable, that producers entering the pool be treated differently for a short period of time.

On the other hand, there was no necessity for Congress to provide specifically for compensatory payments by nonpool handlers. As we have seen, nothing in Section 8c(5) prohibits the inclusion of provisions in a milk order for such payments should the Secretary find that they are required to effectuate the overall regulatory scheme. See *supra*, p. 34*ff*.

## II

### PETITIONERS ARE ESTOPPED TO ATTACK THE PARTIAL REGULATION WHICH THEY CHOSE VOLUNTARILY IN PREFERENCE TO FULL REGULATION

Full regulation of petitioners is permissible. See *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d

332 (C.A. 3), certiorari denied, 338 U.S. 905, in which it was held that the Secretary had the authority to include under a milk order a plant all of whose milk was sold outside the marketing area. Under the 1957 amendments to Order No. 27, petitioner Suncrest had the option of choosing either pool plant or nonpool plant status, and elected the latter. Petitioner Lehigh would have had the same option had it not changed its operations so as not to qualify as a pool plant. See fr. 12, *supra*, p. 11.[27] Under the 1958 amendments, both petitioners would have automatically become pool plants had they not elected to be nonpool plants (R. 893, 895).

Having taken advantage of the option given to them by the order to accept the benefits of partial regulation in lieu of full regulation,[28] petitioners now attack the order for the purpose of avoiding the burdens of that partial regulation, without however accepting full regulation. This they may not do. In *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3), *supra*, a handler similarly accepted the benefits of a marketing order and then endeavored to escape the consequences of its choice. The Third Circuit stated (176 F. 2d at 336):

> * * * In the first place, Titusville hardly is in a comfortable position to assert that it was not

---

[27] It may be noted that, in the *Kass* case, there was no alternative of full regulation as a pool plant.

[28] For the disadvantages of full regulation, see 22 F.R. 4207–4208; *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66, 72 (N.D. Ohio).

> a "handler" within the definition of the Order, when Titusville voluntarily placed and kept itself in the category, gained whatever benefits accrued to being a member of that group, and until January 16, 1942, effectually retained the right to make shipments into the Area as and when it pleased.

In *Booth Fisheries* v. *Industrial Commission,* 271 U.S. 208, 211, this Court held that an employer—

> having elected to accept the provisions of the law, and such benefits and immunities as it gives, may not escape its burdens by asserting that it is unconstitutional. The election is a waiver and estops such complaint.

Accord: *Fahey* v. *Mallonee,* 332 U.S. 245, 255–256; *United States* v. *San Francisco,* 310 U.S. 16, 29. See also *Callanan Road Co.* v. *United States,* 345 U.S. 507, 513; *St. Louis Co.* v. *Prendergast Co.,* 260 U.S. 469; *Yarnell* v. *Hillsborough Packing Co.,* 70 F. 2d 435, 438 (C.A. 5). Cf. *United States* v. *Rock Royal Co-op., supra,* at p. 560, where the Court ruled that cooperatives were not entitled to complain of the benefits conferred on them by this Act.

## III

### PETITIONERS ARE SUBJECT TO FULL REGULATION AS POOL PLANTS, IF PARTIAL REGULATION FAILS

We have seen that, under Order No. 27, petitioners are subject to full regulation as pool plants or partial regulation as nonpool plants, and that the Secretary has full authority to bring petitioners into the pool. If the alternative of partial regulation should fail, it would follow that full regulation is applicable

and that petitioners must therefore comply with all of the provisions of the order pertaining to pool handlers.

In *Queensboro Farms Products* v. *Wickard,* 137 F. 2d 969 (C.A. 2), the court concluded that, if an exception to a classification is invalid, the classification minus the exception still stands and applies. It reasoned (137 F. 2d at 979):

> Appellant seems to contend that, as construed by the Secretary, this exception is unauthorized by the Act and that, therefore, the entire order is void. We cannot agree. For, if appellant's contention as to the exception were sound, the maximum result would be that the exception would be void. But the classification, minus the exception, as it applies to appellant—i.e., the form in which the product is delivered by the handler to the handler's customers—would then still stand; the Secretary's decision against appellant thus would still be valid, even assuming the exception to be wholly void. In other words, attacks on the validity of the exception can be of no avail to appellant and, therefore, need not here be considered. We can, then, ignore the exception as irrelevant. Cf. *City Bank Farmers Trust Co.* v. *Hoey,* 2 Cir., 125 F. 2d 577, 579.

Since Order No. 27 was promulgated under an Act which expressly provides for separability of provisions (7 U.S.C. 614), the provisions of the order implementing the statute should also be severable; and the invalidity of an alternative provision should not affect the validity of the remaining alternative of full regulation which, as pointed out above, is

authorized and valid under the Act. Cf. *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C.A. 5); *Yankton Sioux Tribe* v. *United States*, 272 U.S. 351.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

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NOVEMBER 1961.

## APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, provides, in pertinent part:

SECTION 8c, 7 U.S.C. 608c. ORDERS REGULATING HANDLING OF COMMODITY.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided,* That except in

the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * *

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

* * * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * * *

(7) *Terms common to all orders.*

In the case of the agricultural commodities and the products thereof specified in subsection (2) of this section orders shall contain one or more of the following terms and conditions:

* * * * *

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5)–(7) of this section and necessary to effectuate the other provisions of such order.

* * * * *

(11) *Regional application.*

(A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds

that the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of sections 601–604, 607, 608, 608a, 608b, 608c, 608d, 608e–1, 608f–612, 613, 614–619, 620, 623, and 624 of this title.

* * * * *

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

* * * * *

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL., *Petitioners,*

v.

UNITED STATES, ET AL., *Respondents*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE, AND BRIEF, OF DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., ET AL.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL., *Petitioners,*

v.

UNITED STATES, ET AL., *Respondents*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE OF DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., ET AL.

Pursuant to Rule 42(3) the organizations listed below, by their attorneys, Frederic P. Lee and John A. Cardon, move this Court for leave to file jointly a brief *amici curiae* in support of Respondents, the United States of America and the Secretary of Agriculture:

Dairymen's League Cooperative Association, Inc. New York, New York
Eastern Milk Producers Co-operative Association, Inc., East Syracuse, New York
Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Syracuse, New York

Mutual Federation of Independent Cooperatives, Inc., Syracuse, New York
United Milk Producers Cooperative Association of New Jersey, Trenton, New Jersey
Connecticut Milk Producers Association Hartford, Connecticut
Independent Dairy Farmers Association, Inc. Fort Lauderdale, Florida
Mississippi Milk Producers Association Jackson, Mississippi
New England Milk Producers' Association Boston, Massachusetts
Ohio Milk Producers Federation Columbus, Ohio
Texas Milk Producers Federation New Braunfels, Texas
Twin Ports Co-Op Dairy Association Superior, Wisconsin
United Dairymen's Association Seattle, Washington
United Farmers of New England, Inc. Boston, Massachusetts

The Respondents consented to the filing by the Applicants of a brief *amici curiae,* a copy of which is attached hereto. The Petitioners refused such consent, although requested by the Applicants. The interest of the Applicants and the reasons for this motion are as follows:

(1) The first five named Applicants are subject to the Federal Order here in question and have a direct interest in the litigation. Their membership totals approximately 37,000 producers in the States of New York, Pennsylvania, New Jersey, Massachusetts and Vermont. This represents about 75% of the more than 49,000 producers whose milk is regulated under the Federal Order. The first three named Applicants

participated in all hearings held by the Secretary of Agriculture concerning the need for the amendment which made Petitioners subject to the Federal Order and were permitted to intervene in the review proceedings before the Judicial Officer.

By order of the District Court below, Petitioners, Lehigh and Sunerest, are required, *pendente lite*, to make compensatory payments into the registry of that Court. As of July 31, 1961, the District Court held approximately $726,000. In the event this Court affirms the decision of the Court of Appeals below, the said $726,000 will be paid to the Market Administrator and distributed through the equalization fund to the producers whose milk is subject to the Federal Order. On the other hand, if the Court reverses the Court of Appeals below, the members of these five Applicants will be deprived of said moneys.

(2) The Federal Order is complementary to New York Milk Order No. 126 and New Jersey Milk Order No. 57-3. The three Orders are identical in all material respects, including compensatory payment provisions. All three Orders are jointly and concurrently administered by the Market Administrator to cover the totality of commerce in the marketing area. (See Br., pp. 9-11) The compensatory payments in the registry of the District Court are payable by Lehigh and Sunerest to the Market Administrator and the equalization fund not solely under the Federal Order, the New York Order or the New Jersey Order but by virtue of the concurrent and joint operation of all three Orders. If the provisions of the Federal Order are held invalid, then the validity of these same compensatory payments made under the State Orders must

be determined. The Applicants' Brief deals specifically with the questions arising out of the State Orders.

(3) The last nine named Applicants have approximately 39,000 members located in the States of Maine, Vermont, New Hampshire, Rhode Island, Massachusetts, Connecticut, New York, Pennsylvania, Ohio, Indiana, Michigan, Wisconsin, Minnesota, West Virginia, Kentucky, Florida, Mississippi, Texas, Oklahoma, New Mexico, Washington, and Idaho. Although their members are not under the complementary Order involved here and have no monetary interest in the amount in the registry of the District Court below, the vast majority are under Federal milk marketing orders containing compensatory payment provisions comparable to those in issue. A holding by this Court that the compensatory payment provisions in the Order in question are invalid will adversely affect the milk orders directly involving these nine Applicants or their members.

(4) There is pending before the United States Court of Appeals for the Sixth Circuit the case of *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio, 1960), involving the validity of the compensatory payment provisions of Federal Milk Marketing Order No. 75 under circumstances similar to those presented here. Three members of Ohio Milk Producers Federation (Akron Milk Producers Inc., Stark County Milk Producers Association, and Milk Producers Federation of Cleveland) represent producers whose milk is marketed under Order No. 75 and have been granted permission to file briefs in that case. Since a decision has been deferred until the instant case is decided, these organizations have a direct interest in the affirmance of the decision of the Court of Appeals below.

(5) There is pending before the United States Court of Appeals for the Second Circuit the case of *Knudsen Bros. Dairy, Inc.* v. *Benson* (No. 26698), on appeal from the District Court of Connecticut, involving the validity of compensatory payment provisions of Federal Milk Marketing Order No. 96 similar to those in dispute in the instant case. The first four named Applicants and New England Milk Producers Association and Connecticut Milk Producers Association, filed briefs *amici curiae* in that case. Milk marketed by New England Milk Producers Association represents approximately 75% of the total volume marketed under Order No. 96. The *Knudsen* case was argued on May 4, 1961, but a decision has not been announced. It would appear from the delay that action taken by this Court in the instant case will have a direct bearing on that litigation.

(6) The granting of this motion will not delay or prejudice the adjudication of the rights of the original parties.

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IN THE

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UNITED STATES, ET AL., *Respondents*

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**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

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## BRIEF AMICI CURIAE FOR DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, INC., ET AL.

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### PRELIMINARY STATEMENT

This brief in support of the Respondents, the United States of America and the Secretary of Agriculture, is filed pursuant to leave of the Court on behalf of the following organizations:

Dairymen's League Cooperative Association, Inc. New York, New York

Eastern Milk Producers Co-operative Association, Inc., East Syracuse, New York

Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., Syracuse, New York
Mutual Federation of Independent Cooperatives, Inc., Syracuse, New York
United Milk Producers Cooperative Association of New Jersey, Trenton, New Jersey
Connecticut Milk Producers Association
Hartford, Connecticut
Independent Dairy Farmers Association, Inc.
Fort Lauderdale, Florida
Mississippi Milk Producers Association
Jackson, Mississippi
New England Milk Producers' Association
Boston, Massachusetts
Ohio Milk Producers Federation
Columbus, Ohio
Texas Milk Producers Federation
New Braunfels, Texas
Twin Ports Co-Op Dairy Association
Superior, Wisconsin
United Dairymen's Association
Seattle, Washington
United Farmers of New England, Inc.
Boston, Massachusetts

The Metropolitan Cooperative Milk Producers Bargaining Agency, Inc., is a federation composed of 86 federated and 7 affiliated cooperative corporations located in New York, Pennsylvania, New Jersey and Vermont. The following corporations, totaling 87 in number, have expressly indicated their agreement with the position of the federation in supporting Respondents in this matter:

Adams Center Milk Producers Cooperative, Inc.
Adams Producers Co-Operative, Inc.
Addison Milk Producers Coop. Assn., Inc.
Amsterdam Milk Producers Coop., Inc.
And-Well Producers Cooperative, Inc.

Bear Lake Coop. Milk Producers Assn.
Bennington County Cooperative Creamery, Inc.
Bovina Center Cooperative Dairy, Inc.
Brier Hill Milk Producers Cooperative, Inc.
Burke Milk Producers Cooperative, Inc.
Burlington County Cooperative Milk Producers' Association, Inc.
Campbell Milk Producers Coop., Inc.
Canajoharie Coop. Milk Producers, Inc.
Canoe Camp Cooperative Milk Producers Association, Inc.
Canton Producers Cooperative, Inc.
Cape Vincent Milk Producers Cooperative, Inc.
Central New York Cooperative Association, Inc.
Champlain Milk Producers Cooperative, Inc.
Chateaugay Milk Producers Coop., Inc.
Chautauqua Maid Cooperative, Inc.
Churubusco Milk Producers Cooperative, Inc.
Circleville Milk Producers Coop., Inc.
Cooperative Dairymen of Cannonsville, N. Y., Inc.
De Kalb Producers Cooperative, Inc.
East Freetown Milk Producers Cooperative, Inc.
Edwards Milk Producers Cooperative, Inc.
Ellenburg Milk Producers Coop., Inc.
Fair Haven Milk Producers, Inc.
Finger Lakes Milk Producers Cooperative, Inc.
Fort Edward Milk Producers Association, Inc.
Galeton Coop. Milk Producers Assn., Inc.
Gouverneur Cooperative Dairymen, Inc.
Gracie Dairy Cooperative Association, Inc.
Harford Milk Producers Cooperative, Inc.
Hunterdon County Cooperative Milk Producers' Association
Keuka Milk Producers Cooperative, Inc.
Konhokton Milk Producers Cooperative Association, Inc.
Leon Milk Producers Cooperative, Inc.
Liberty Valley Coop. Milk Prod. Assn., Inc.
Lisbon Producers Cooperative, Inc.
Madrid Milk Producers Cooperative, Inc.

Malone Milk Producers Cooperative, Inc.
Martville Milk Producers Cooperative, Inc.
Mercer County Milk Producers Association, Inc.
Middlebury Coop. Milk Prod. Assn., Inc.
Middlesex County Cooperative Milk Producers Association
Milanville Milk Producers Association, Inc.
Monmouth County Cooperative Milk Producers' Association, Inc.
Montgomery Eastern Dairy Cooperative, Inc.
Montgomery Producers Cooperative, Inc.
Mooers-Irona Milk Producers Cooperative, Inc.
Morris County Cooperative Milk Producers' Association, Inc.
Mount Joy Farmers Cooperative Assn.
Nicholson Cooperative Milk Producers Association, Inc.
Norfolk Producers Cooperative, Inc.
North Country Producers Coop., Inc.
Northern Adirondack Milk Producers Cooperative, Inc.
Ogdensburg Coop. Milk Producers, Inc.
Orange-Ulster County Milk Producers Cooperative, Inc.
Osceola Milk Producers Cooperative Association, Inc.
Oswegatchie Milk Producers Coop., Inc.
Otselic Valley Milk Producers Cooperative Association, Inc.
Owasco Valley Producers Cooperative, Inc.
Pierrepont Manor Milk Producers Cooperative, Inc.
Poland Milk Producers Coop. Assn., Inc.
Port Allegany Cooperative Milk Producers Association
Portville Milk Producers Cooperative, Inc.
Potsdam Milk Producers Cooperative, Inc.
Preble Milk Cooperative Association, Inc.
Roseville Coop. Milk Producers Assn., Inc.

Salem County Cooperative Milk Producers' Association, Inc.
Sherburne Milk Producers Cooperative, Inc.
Slate Hill Producers Cooperative, Inc.
Smyrna Union Cooperative, Inc.
Somerset County Cooperative Milk Producers Association
South Dayton Milk Producers Cooperative, Inc.
South Montrose Dairy Cooperative, Inc.
Steamburg Milk Producers Coop., Inc.
Sugar Grove Cooperative Milk Producers
Sussex County Co-operative Milk Producers Association, Inc.
Towanda Valley Coop. Creamery Association, Inc.
Warren County Cooperative Milk Producers' Association, Inc.
Watertown Milk Producers Cooperative, Inc.
Welsh Producers Coop. Milk Marketing Association, Inc.
West Burlington Coop. Milk Prod., Inc.
Westfield Coop. Milk Producers Association, Inc.
West Leyden Producers Coop. Assn., Inc.

The Mutual Federation of Independent Cooperatives, Inc., is composed of 47 federated cooperative corporations located in New York and Pennsylvania. Mutual is authorized to act on behalf of each of its constituent members in supporting Respondents in this matter. They are:

Andes Co-operative Creamery, Inc.
Border Bulk Tank Milk Producers Cooperative, Inc.
Bridgewater Dairy Farmers Cooperative, Inc.
Canastota Milk Producers Cooperative Association, Inc.
Central New York Bulk Producers Cooperative, Inc.
Chateaugay Cooperative Marketing Association, Inc.

The Chenango Valley Farmers Co-operative Company, Inc.
Clemo Milk Producers Cooperative Association
Clinton County Dairymen's Cooperative Association
Conesus Milk Producers Cooperative Assn., Inc.
Conklin Dairy Farmers Cooperative, Inc.
Cooperative Dairy Farmers of Bellefonte, Pa.
Cooperative Dairy Farmers of Lewisburg, Pa.
Cooperative Dairy Farmers of Middleburg, Pa.
Cooperative Dairy Farmers of Mill Hall, Pa.
Cooperative Dairy Farmers of Spring Mills, Pa.
Coventry Producers Cooperative, Inc.
Croghan Milk Producers Cooperative, Inc.
Crowley's Milk Producers Cooperative Association, Inc.
Fly Creek Valley Co-Operative, Inc.
Guilford Producers Cooperative Association, Inc.
H. P. Farmers Cooperative, Inc.
Kirkland Milk Producers Cooperative, Inc.
Lakes Milk Cooperative, Inc.
Lisle Producers Cooperative, Inc.
Lowville Producers Dairy Cooperative, Inc.
Millport Milk Producers Cooperative Association
North Lawrence Milk Producers Cooperative Association, Inc.
North Penn Bulk Milk Producers Cooperative, Inc.
Oneida Castle Milk Producers Cooperative, Inc.
Ontario Milk Producers' Cooperative, Inc.
Penn York Bulk Milk Producers Cooperative, Inc.
Plattsburg-Chazy Milk Producers Cooperative, Inc.
Producers Cooperative, Inc.
Rockdale Producers Cooperative Association, Inc.
Rock Royal Cooperative, Inc.
Schoharie County Cooperative Dairies, Inc.
Shawangunk Co-operative Dairies, Inc.

Sherrill-Highbridge Milk Producers Cooperative, Inc.
South Cayuga Bulk Milk Cooperative, Inc.
Southern Tier Bulk Milk Producers Cooperative, Inc.
Sullivan County Co-operative Dairy Association, Inc.
Syracuse Dairy Farmers Cooperative, Inc.
Troy Milk Producers Cooperative, Inc.
Van Hornesville Milk Producers Cooperative, Inc.
Washington and Rensselaer Counties Producers Cooperative Association, Inc.
West Coxsackie Milk Producers Cooperative, Inc.

The Texas Milk Producers Federation is composed of 6 federated cooperative corporations representing approximately 8,500 producers located in the States of Texas, New Mexico and Oklahoma, each of which has expressly indicated its agreement with the position of the Federation in supporting the Respondents in the present case. They are:

North Texas Milk Producers Association
Central West Texas Milk Producers Association
Mid-Tex Milk Producers Association
Producers Association of San Antonio
Coastal Bend Milk Producers Association
South Texas Producers Association

The Ohio Milk Producers Federation is composed of 11 federated cooperative corporations representing approximately 15,000 producers in the States of Ohio, Indiana, Pennsylvania, West Virginia, Michigan and Kentucky. Each of the federated corporations has expressly indicated its agreement with the Federation in supporting the position of the Respondents in this matter. They are:

Akron Milk Producers, Inc.
Stark County Milk Producers Association

Milk Producers Federation of Cleveland
Cooperative Pure Milk Association
Cincinnati Milk Sales Association
Miami Valley Milk Producers Association
Central Ohio Cooperative Milk Producers, Inc.
Southeastern Ohio Cooperative Dairy Sales Association, Inc.
Northwestern Cooperative Sales Association
Dairymen's Co-Operative Sales Association
Ross County Milk Producers Association, Inc.

The United Dairymen's Association is composed of 40 federated cooperative corporations, 10 of which are subject to Federal milk marketing orders and represent approximately 2,600 producers in Washington and Idaho. Each of these has expressly indicated its agreement with the position of the Association in supporting Respondents in this matter. They are:

Whatcom County Dairymen's Association
Skagit County Dairymen's Association
Snohomish County Dairymen's Association
Lewis-Pacific Dairymen's Association
Kittitas County Dairymens Association
Grays Harbor Dairymens Association
Seattle Milk Producers Association
Washington Milk Producers Association
Tacoma Milk Producers Association
Inland Empire Dairymen's Association

The map inserted at the back of this brief sets forth the New York-New Jersey milk marketing area subject to the complementary Federal, New York and New Jersey Orders, and the pool plants supplying such area; also the adjoining Philadelphia, Pennsylvania, milk marketing area subject to Federal Order No. 61. 7 C.F.R., Part 961.

## OPINIONS BELOW, JURISDICTION, THE STATUTES INVOLVED, THE STATEMENT OF THE CASE

For the purposes of this brief the *amici curiae* adopt the statements found in the brief for the Respondents, the United States and the Secretary of Agriculture, with respect to the opinions below, jurisdiction of this Court, the statutes involved, and the statement of the case. In addition, the following supplemental statement is made:

The compensatory payments by Lehigh and Suncrest were made, and the moneys therefrom are being held in the registry of the District Court *pendente lite*, not under a Federal program but under a single, joint Federal-New York State-New Jersey State program supported jointly by Federal Order No. 27 (7 C.F.R., Part 927, hereinafter referred to as the Federal Order) issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (50 Stat. 246, as amended, 7 U.S.C. § 601 et seq.), and two State Orders whose terms are identical in all material respects with the Federal Order. These State Orders are: Revised Official Order No. 126, issued by the Commissioner of Agriculture and Markets of the State of New York, pursuant to the laws of that State (hereinafter referred to as the New York Order); and Revised Official Order No. 57-3, issued by the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey, pursuant to the laws of that State (hereinafter referred to as the New Jersey Order). Copies of the relevant portions of the New York State Order are set forth in Supplement A to this brief. Copies of the relevant portions of the New Jersey State Order will be found in the Supplement to the brief of the State of New Jersey.

Not only are the Federal, New York, and New Jersey Orders identical in all material respects, including the provisions relating to compensatory payments, but also all three apply to milk of all pool plants and to all milk of non-pool plants shipped to, received in, or distributed in the New York-New Jersey milk marketing area. Orders § 927.83(a). All three Orders are administered jointly by a single official, a Market Administrator, appointed jointly by the United States Secretary of Agriculture, the Commissioner of Agriculture and Markets of the State of New York, and the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey. There is a single producers' settlement fund (hereinafter referred to as the equalization fund) administered by the Market Administrator, into which payments (including compensatory payments), and from which disbursements, under all three Orders are made. Moneys in the equalization fund, including compensatory payments, are not segregated or earmarked on the basis of one or the other of the three Orders.

The program regulating the marketing of milk in the New York-New Jersey milk marketing area, is a single, joint program resting jointly on the Federal and the New York and New Jersey Orders. The three Orders are not complementary in the sense that each carves out for regulation a segment of the commerce in milk in the New York-New Jersey milk marketing area and that the three segments when fitted together equal the totality of that commerce. Thus the New York Order is not confined to New York intrastate commerce, the New Jersey Order to New Jersey intrastate commerce, and the Federal Order to interstate commerce. All three Orders are complementary and concurrent

in the sense that all three concurrently cover the totality of the commerce in milk for the New York-New Jersey milk marketing area.

Lehigh and Sunerest have not contested the validity of the compensatory payment provisions of the New York or New Jersey Orders.

The policy of a single, joint program resting on both Federal and State Orders goes back to the beginnings of the regulating of milk marketed in the metropolitan area around New York City. Congress designed the authority conferred by its Act to the end that Federal Orders should complement and make enforceable any State Order regulating milk marketed in that area. This is developed in Point I of our Argument.

## STATEMENT OF THE QUESTIONS INVOLVED

The Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937 (50 Stat. 246, as amended, 7 U.S.C. § 601, et seq., hereinafter referred to as the Act), has issued an Order, complementary to Orders of the States of New York and New Jersey identical in all material respects, regulating through a single, joint Federal-State program the handling of milk marketed in the New York-New Jersey milk marketing area. The questions are—

1. Whether the Secretary has statutory authority to provide in the Federal Order that a non-pool handler as to fluid milk distributed in the regulated marketing area pay into the producer settlement fund a compensatory payment amounting to the difference between the minimum class prices for fluid and manufactured milk—the handler having elected to make such payment in lieu of being fully regulated under the

Order and it having been found by the Secretary and both of the lower courts that the compensatory payment provision is supported by the record of the administrative hearings, is incidental to other provisions of the Order, and is necessary to effectuate them.

2. Whether the handler is estopped from contesting the validity of the present compensatory payment provision if he elects to make such payment.

3. Whether if the present elective compensatory payment provision is held invalid, the handler then remains subject to full regulation under the Order.

## SUMMARY OF ARGUMENT

Section 10(i) of the Act authorizes, but does not require, the Secretary of Agriculture to issue Orders under § 8c complementary to Orders issued by State authorities. The Federal Order in question was issued under that authority as a result of joint action by the Secretary of Agriculture and the States of New York and New Jersey. It took effect only upon the issuance of Orders by those States. The three Orders constitute a joint and concurrent plan of milk regulation necessitated by the decision of this Court in *Baldwin* v. *Seelig,* 294 U.S. 511 (1935). The provisions of the Federal Order requiring compensatory payments are designed to handle the problem of peripheral milk coming into the marketing area, a problem which the States alone would be unable to solve with respect to out-of-state milk. The Federal Act must not be construed to render the Federal Government powerless to act with the States to fashion a joint Federal-State regulatory scheme as contemplated by the statute.

The Secretary's authority to prescribe the compensatory payment provisions of the Federal Order is

found in § 8c(7)(D) of the Act providing that orders shall include terms and conditions "incidental to and not inconsistent with the terms and conditions specified in subsections (5), (6), and (7) of this section and necessary to effectuate the other provisions of such order". The Order classifies milk according to its use and fixes minimum class prices for such uses as provided in § 8c(5)(A) of the Act. Pursuant to § 8c(5)(B) the Order provides for the payment of a uniform price (referred to as the uniform blended pool price) to producers for milk delivered to handlers irrespective of the use made of such milk by the individual handler to whom it is delivered. These pricing provisions of the Act are carried out by pooling all milk subject to minimum prices and accounting for it through the producers' settlement fund (referred to as the equalization fund). The validity of the equalization fund was upheld by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). The compensatory payment provisions of the Order are necessary to maintain the minimum prices and assure the integrity of the equalization fund.

The minimum prices provided for by § 8c(5)(A) of the Act are not prices which must be paid *to* producers for milk, but are prices at which pool handlers must *account* to the equalization fund *for* milk sold to them. The price which must be paid *to* producers for pool milk is the uniform blended pool price provided for in § 8c(5)(B) and determined by the pooling mechanism of the equalization fund.

Not all milk sold in the marketing area is subject to the minimum price provisions of the Federal Order. The application of these prices must be determined with reference to § 8c(11)(A) of the Act. Under that

section milk orders are issued on the basis of marketing areas. Thus, the Secretary must define the marketing area and must determine what milk shall be included in the milk pool for the area. The Secretary has defined the pool milk as "milk received . . . from producers" (7 C.F.R. § 927.40) and defined "producer" as "any dairy farmer whose milk is delivered from a farm to a pool plant" (7 C.F.R. § 927.6). The minimum prices prescribed by the Federal Order are applicable only to the milk which is determined to be in this pool. Thus, only handlers of pool milk are required to account to the equalization fund at the minimum prices established under § 8c(5)(A) of the Act, and only pool handlers must pay the uniform blended pool price to producers required by § 8c(5)(B).

The Petitioners are not handlers of pool milk. Neither Lehigh nor Sunerest is obligated to account to the equalization fund at the minimum prices established by the Order and neither is required to pay the uniform blended pool price to his producers. Each is free under the Order to pay his producers whatever price may be agreed upon without regard to the uniform blended price. The compensatory payments required of the Petitioners under the Order are not, therefore, part of the minimum price and are not subject to the requirement for uniformity prescribed by § 8c(5)(A).

The regulation of pool milk on a *regional* basis as required by § 8c(11)(A) of the Act necessitates some regulation of handlers of non-pool milk who sell their milk in the marketing area for fluid purposes. When non-pool milk is sold in the marketing area, it displaces a like amount of pool milk and forces the pool milk into the lowest valued surplus class utilization. Thus, the pool handler, instead of accounting to the equalization

fund at the Class I price for fluid milk, accounts for the displaced milk at the lower Class III price for manufacturing purposes. Since the uniform blended pool price is merely the average price of all pool milk accounted for to the equalization fund at the established minimum class price for its particular use, it follows that a reduction in the relative amount of Class I milk in the pool results in a lower uniform blended pool price. Unless some device is used to make up the difference to the equalization fund, the producers who constitute the regular supply of pool milk stand to bear the loss. The Order therefore requires the non-pool handler to make a compensatory payment into the equalization fund, thereby making the fund whole and enabling the fund to operate in the manner approved by this Court in the *Rock Royal* case.

Moreover, since the non-pool handler is not obliged to account to the equalization fund for the fluid milk sold within the marketing area, he would, in the absence of a compensatory payment provision in the Federal Order, be free to retain the difference between the Class I price and the Class III price. This amount could be used to increase his own profit or to compete with pool handlers for the patronage of producers. Accordingly, without a compensatory payment requirement the non-pool handler has a competitive advantage over the pool handler. He has all the benefits of a regulated market but bears none of the burden of surplus.

The Secretary found that there is a necessity for compensatory payments and the Judicial Officer, the District Court and the Court of Appeals determined that the Secretary was supported by the record.

The Petitioners rely on the decision of the Court of Appeals for the Second Circuit in *Kass* v. *Brannan*, 196 F. 2d 791 (C.A. 2, 1952), holding that the compensatory payments under the Federal Order are invalid as violative of the uniformity requirement of § 8c(5)(A) of the Act. In reaching this result the Second Circuit held that the compensatory payment is part of the minimum price under § 8c(5)(A) and that since the amount of the compensatory payment plus the initial cost of milk to the handler exceeded the minimum class price of raw milk under the Order, it was inconsistent with § 8c(5)(A).

The *Kass* holding is erroneous because, as already shown, the minimum prices under § 8c(5)(A) do not apply to handlers of non-pool milk. Therefore, the compensatory payment is not part of the minimum price and cannot be inconsistent with it. The Second Circuit also erred in concluding that compensatory payments are designed to equalize costs between handlers of pool milk and handlers of non-pool milk. The Act does not require equalization of such costs, nor does it authorize such equalization. The true purpose of compensatory payments is to compensate the equalization fund for the loss due to displacement of pool milk by non-pool milk to the end that the minimum pricing provisions of the Act can be maintained.

Compensatory payments are moneys belonging to producers of pool milk. The Federal Order properly requires that they be paid into the equalization fund. Payment of these amounts to producers of non-pool milk would not compensate the fund for the loss due to the displacement of pool milk.

Under the terms of the Federal Order, Lehigh and Suncrest were free to elect to become pool plants and

subject to full regulation or to reject such status and become partially regulated through payment of the compensatory payments. Having elected to make compensatory payments, they are estopped to contest their validity.

The scope of the present Order is broad enough to subject handlers to full regulation, including Lehigh and Sunerest. The authority of the Secretary to make such complete regulation has been upheld. In the event the compensatory payment provisions of the Order are held invalid, the rest of the Order will stand and the Petitioners will become subject to full regulation thereunder.

The argument of Lehigh and Sunerest that the compensatory payment provisions of the Federal Order are in conflict with § 8c(5)(G) of the Act presents an issue not passed upon by the courts below. Lehigh and Sunerest are precluded from raising it at this time. Assuming the issue may now be raised, the compensatory payment provisions are not invalidated by § 8c(5)(G). The legislative history of this section of the Act makes it clear that Congress did not intend to deprive the Secretary of power to impose reasonable restrictions on fluid milk in interstate commerce such as those contained in the Federal Order.

## ARGUMENT

### I. THE FEDERAL ACT IS TO BE CONSTRUED IN THE LIGHT OF ITS HISTORICAL OBJECTIVE OF COMPLEMENTING AND MAKING EFFECTIVE STATE REGULATION OF MILK MARKETED IN THE MARKETING AREA.

The problem of regulation by a State of milk sold within a marketing area in the State by peripheral handlers located outside the State was before Congress in enacting the Agricultural Marketing Agreement Act of 1937. In 1934 this Court held valid basic provisions of the New York Milk Control Laws enacted a year earlier fixing minimum purchase prices to be paid all producers for their milk. *Nebbia* v. *New York*, 291 U.S. 502 (1934); *Hegeman Farms Corporation* v. *Baldwin*, 293 U.S. 163 (1934). However, on March 4 of the following year (1935), this Court held that the State, acting alone, lacked power to prohibit within its borders sales of milk produced outside of New York State and purchased from producers at less than the minimum prices fixed for purchases from producers in New York State. *Baldwin* v. *Seelig*, 294 U.S. 511 (1935). The decision rendered an isolated State program for an interstate milk marketing area impracticable.

It was to remedy the breakdown created by the *Seelig* decision that the Congress enacted § 10(i) of the Act effective August 24, 1935, and reenacted it in 1937, and that the New York State Legislature in the latter year enacted § 258-n of its Agriculture and Markets Law. L. 1937, ch. 383; McKinney's Consolidated Laws of New York, Book 2-B, § 258-n.

Thus, the Act (§ 10(i)) provides that—

> "(i) *The Secretary of Agriculture upon the request of the duly constituted authorities of any*

> *State is directed*, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, *to confer with and hold joint hearings with the duly constituted authorities of any State*, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; *to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities*; and to make available to such State authorities the records and facilities of the Department of Agriculture; . . ." [emphasis supplied]

Congress contemplated that a Federal Order would complement the New York State Order. At the time of the enactment of § 10(i) of the Act, the House Committee on Agriculture in its report (H. Rept. 1241, 74th Cong., 1st Sess., p. 22) stated that:

> "* * * *The new subsection* [§ 10(i)] *authorizes*, but does not require, *the Secretary* * * * *to issue orders* under the provisions of § 8c of the Act *complementary to orders or other regulations issued by the state authorities.* The authorization is to further carry out the declared policy of the title and looks to securing voluntary *uniformity in the formulation, administration, and enforcement of state and Federal programs* relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products." [emphasis supplied]

The Senate Committee on Agriculture and Forestry made a similar statement in its report (S. Rept. 1011, 74th Cong., 1st Sess., p. 15) in which the Committee described the authority granted by § 10(i) as one "to carry out the declared policy of the title and looks to securing voluntary uniformity in the formulation, administration, and enforcement of State and Federal programs relating to the regulation of the production, handling, marketing, and sale of agricultural commodities and their products".

Referring to § 10(i) of the Act, Mr. Justice Black has described the Congressional objective of a State-Federal integrated regulatory system through complementary orders in his dissenting opinion in *Hood & Sons* v. *DuMond*, 336 U.S. 525, 560 (1949), the nature of the Congressional objective not being a matter of dispute between the majority and minority of the Court, as follows:

> "In the foregoing provisions Congress manifested its purpose to subject the milk industry to two cooperating authorities: (1) state legislatures and their selected administrative authorities, and (2) the Secretary of Agriculture. Congress did far more than direct a formal, polite cooperation between New York and the Secretary of Agriculture. Recognizing the compelling necessity for a state-federal integrated regulatory system for the milk industry, Congress was careful to leave the door open for the Secretary of Agriculture and state authorities working together to formulate mutually complementary orders in the field. These complementary state-federal laws and orders were to be aimed at precisely the same evils believed to have been generated by chaotic competitive conditions in the milk industry. The objective of both laws was to help impoverished farmers."

On August 26, 1938, pursuant to their respective statutory authorities the Commissioner of Agriculture and Markets for New York and the Secretary of Agriculture of the United States formally entered into a "Memorandum of the Principles of Cooperation to be Observed in the Formulation and Administration of Complementary Orders for Milk for Marketing Areas Located Within the State of New York to be Issued Concurrently by the Secretary of Agriculture and the Commissioner of Agriculture and Markets". See Appendix A of the brief *amicus curiae* filed by the State of New York; *Hood & Sons* v. *DuMond*, 336 U.S. 525, 541 (1949). In the Memorandum it is stated in part that:

> "It shall be the policy of the Secretary of Agriculture and the Commissioner to act jointly in the formulation and issuance of complementary and concurrent orders * * * and in pursuance thereof to jointly arrange for cooperation in the conduct of preliminary investigations, to hold joint or concurrent hearings, to jointly consider the facts contained in the record of such hearings, and to maintain a mutual exchange of views conducive to *common agreement upon all essential provisions prior to the issuance of either order.* The same policy of joint action shall be followed with respect to modifications of or amendments to such orders." [emphasis supplied]

Even prior to the formal signing of the Memorandum, the Secretary and the Commissioner were holding joint hearings on proposed milk marketing orders for the New York metropolitan milk marketing area (3 F.R. 1945; *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533, 548 (1939)). These became the Federal and New York State Orders here

under consideration. In adopting the Federal Order on August 5, 1938, the Secretary of Agriculture said:

> "This order shall become effective after the issuance by the Commissioner of Agriculture and Markets of the State of New York of an order containing provisions similar to the provisions of this order and to which this order shall be complementary * * *." 3 F.R. 1951.

The Federal Order was held valid by this Court in the *Rock Royal* case, *supra*.

The compensatory payment provision of the Federal Order in its form pertinent to the present litigation was promulgated by the Secretary of Agriculture in 1953 and has been in effect continuously since that time. On January 12, 1953, the Commissioner of Agriculture and Markets of the State of New York issued a Notice of Hearing (compare Supplement B this brief) in which he stated in part:

> "The Commissioner of Agriculture and Markets of the State of New York promulgated, effective September 1, 1938, Official Order No. 126 regulating the handling of milk in the New York Metropolitan Milk Marketing Area. Such order was promulgated jointly and concurrently with the promulgation by the Secretary of Agriculture of the United States of the latter's Order No. 27 regulating the handling of milk for the aforesaid marketing area. Since their promulgation, such joint and concurrent orders have been jointly revised and amended from time to time by the aforesaid officials. The terms and conditions of the State and Federal orders referred to above have at all times been similar and such orders have been jointly administered."

The Commissioner then proceeded in his Notice to call a hearing "to be held jointly and concurrently

with the United States Department of Agriculture with respect to proposed amendments to the State Order", as well as to the Federal Order. Following the hearings the United States Secretary of Agriculture and the Commissioner of Agriculture and Markets of the State of New York each issued in 1953 identical amendments to their respective Federal and State Orders, including the compensatory payment provision.

The State of New Jersey subsequently became concerned with the problem of pricing milk brought into that State from peripheral plants located outside the State. The minimum prices for milk covered by the New Jersey statutes could not apply to milk marketed in New Jersey from unregulated plants outside the State nor from plants regulated under the Federal and New York State Orders. The minimum prices fixed by New Jersey for milk produced in New Jersey and marketed in northern New Jersey could not be made effective in the face of this competitive situation. A New Jersey milk producers' association proceeded to institute litigation seeking to remedy the situation by compelling certain amendments to the Federal Order. The United States Court of Appeals for the District of Columbia Circuit held that the plaintiff lacked adequate justiciable interest. *United Milk Producers of New Jersey* v. *Benson*, 225 F. 2d 527 (1955).

In the same year (1955) the United States Secretary of Agriculture, and the Director of the Office of Milk Industry, Department of Agriculture of the State of New Jersey, entered into a Memorandum of Understanding similar to that entered into earlier between the Secretary and the Commissioner of Agriculture and Markets of the State of New York. Also notices of joint and concurrent hearings were issued by the

Secretary, the Director, and the Commissioner, on proposals to extend the marketing area under the Federal and New York State Orders, and all provisions of these Orders, including the compensatory payment provision, to northern New Jersey and additional areas in New York State. (Compare New York State Notices, see Supplement B this brief.)

Following the hearings the Federal and New York State Orders were amended identically to provide for such extensions, and the Director of the Office of Milk Industry, State of New Jersey, issued a New Jersey State Order identical in all material respects with the amended Federal and New York Orders. Thereby, a single, joint program for the marketing of milk in the New York-New Jersey milk marketing area was established by the United States and the two States, and milk marketed in the marketing area from peripheral plants not fully regulated by the three Orders became subject to the compensatory payment provisions of those Orders.

The problem of dealing with the peripheral handling of milk in the regulated areas is not limited to Lehigh and Sunerest. The boundaries of the marketing area reach from Southern New Jersey into Northern New York. (See map inserted in this brief.) Along the periphery of this marketing area there are numerous milk dealers either with limited sales within the area or having the potential of such sales. The integrity of the regulatory program depends upon the effectiveness of the regulation of these fringe dealers, and the State and Federal regulatory authorities were faced with the decision whether to impose full regulation upon such dealers or create a less stringent device for preserving the effectiveness of the milk regulation.

The Federal Government could have taken over the whole field of regulation of milk approved for, shipped to, received in, or distributed in the New York-New Jersey milk marketing area. Cf., *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905; *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 351 (1939). The Federal Government chose not to do this. As to this marketing area, the States having acted, the Federal Government contents itself with the role of complementing concurrent State Orders. The policy of the Federal Act "may be effectuated by a state program either with or without the promulgation of a Federal program by order of the Secretary". *Parker* v. *Brown*, 317 U.S. 341, 354 (1943). It lies within the discretion of the Secretary to determine whether, when a state has a program, a Federal complementary order will be issued to make that program effective.*

What Lehigh and Sunerest are actually contending is that § 8c(5)(A) of the Act should be construed so as to bar the Federal Government from complementing in its Order the compensatory payment provisions of the State Orders. There is no claim that the statutory authority of the State officials is inadequate for inclusion of the compensatory payment provisions in their State Orders.

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* There are other instances where Federal Acts serve the function of preventing supersedure and preserving state control in areas where State and Federal law may be overlapping or be concurrent. *Rice* v. *Chicago Board of Trade*, 331 U.S. 247 (1947); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946); *Whitfield* v. *Ohio*, 297 U.S. 431 (1936); *Panhandle Eastern Pipe Line Co.*, 332 U.S. 507, 521 (1947).

The historical setting of the Act, the necessity for dealing with peripheral handlers shipping from without a State into a marketing area within the State, and the Congressional objective to further and complement State regulation, indicate that the Act should be liberally construed to make it possible for the Federal Government to complement and make fully effective State Orders. State regulation alone cannot be fully effective if the Federal Government is powerless to complement the State Orders by dealing with peripheral handlers shipping into a State from outside the State. If this Court were to reverse the Court of Appeals for the Third Circuit, the effect would be to bar the Federal Government from exercising its power to complement the compensatory payment provisions of the New York and New Jersey Orders, and to render ineffective the entire scheme of joint Federal-State milk regulation.

## II. SECTION 8c(7)(D) OF THE ACT VESTS IN THE SECRETARY OF AGRICULTURE AUTHORITY TO PRESCRIBE THE COMPENSATORY PAYMENT PROVISION OF THE FEDERAL ORDER.

The conflict between the decision of the Court of Appeals below and the decision of the Court of Appeals for the Second Circuit in *Kass* v. *Brannan*, 196 F. 2d 791 (1952), cert. den. 344 U.S. 891, centers on the scope of the power conferred upon the Secretary of Agriculture by § 8c(7)(D) of the Act, providing that a milk marketing order shall include terms and conditions—

> "(D) Incidental to and not inconsistent with the terms and conditions specified in subsections (5), (6) and (7) and necessary to effectuate the other provisions of such order."

The scope of the Secretary's authority under this section must be determined in light of the objectives of

the Act.* Congress, so far as here relevant, designed the Act to establish and maintain for farmers stated price levels (Act, § 2(1) and § 8c(18)) and orderly marketing conditions (Act, § 2(4)). The Act is a farmers' Act. It was not designed to create competitive advantages for non-pool handlers. As to milk the objectives of the Act are to be accomplished through programs of minimum class pricing for each class use of pool milk (Act, § 8c(5)(A)) and the payment of a uniform blended pool price to producers irrespective of the class use made of a particular farmer's pool milk (Act, § 8c(5)(B)). The accomplishment of minimum pricing and payment of uniform prices to producers is effected through pooling all fully regulated milk (Act, § 8c(5)(C)). The programs are to be embodied in milk orders for marketing areas established on a regional basis (Act, § 8c(11)(A)).

Pursuant to the Act, the Federal Order provides for a classification of milk according to its various uses (7 C.F.R. § 927.37) and establishes minimum prices for each use classification (7 C.F.R. § 927.40). The Order further provides for a producer settlement fund, commonly referred to as the "equalization fund" (7 C.F.R. § 927.75). The equalization fund is the heart of the regulatory scheme. Through the mechanism of the fund all regulated milk is pooled and the uniform blended pool price determined and paid as required by § 8c(5)(B)(ii) of the Act. The legality of the equalization fund was considered and upheld by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). The importance of the equaliza-

* For a summary and discussion of the provisions of the Act concerning milk regulation, see *Brooks, The Pricing of Milk under Federal Marketing Orders*, 26 George Washington Law Review 181.

tion fund to the objectives of the Act was described by the Court (p. 572) as follows:

> "* * * The pool is only a device reasonably adapted to allow regulation of the interstate market upon terms which minimize the results of the restrictions. It is ancillary to the price regulation designed, as is the price provision, to foster, protect and encourage interstate commerce by smoothing out the difficulties of the surplus and cut-throat competition which burdened this marketing. * * *"

For reasons given below, compensatory payments are essential to the equalization fund as approved by this Court and the maintenance of minimum prices contemplated by § 8c(5)(A) of the Act. The Judicial Officer of the Department of Agriculture in his decisions on the validity of the compensatory payment provision of the Federal Order and the District Court on review of those decisions both found that the compensatory payment provision is incidental to, and necessary to effectuate, the other terms of the Order. R. 226a-228a. The Court of Appeals agreed with the conclusion of the District Court on this point. R. 906. The conflict with the *Kass* decision is on the specific issue under § 8c(7)(D) of whether or not the compensatory payment provisions of the Order are "inconsistent with" the requirement of § 8c(5)(A) of the Act that minimum prices be "uniform as to all handlers".

**A. The Application of § 8c(5)(A) Relating to Uniform Minimum Prices Is Controlled By § 8c(11)(A) Relating to Regional Marketing Areas. Section 8c(5)(A) Does Not Apply to Non-Pool Milk.**

Section 8c(11)(A) of the Act requires that all marketing orders be issued on the basis of "regional production areas or regional marketing areas, or both".* All Federal milk marketing orders are on a regional marketing area basis. In the Federal Order here under consideration the marketing area is that region defined in the Order as the New York-New Jersey milk marketing area.

Upon establishing a regional marketing area there must, under the Act, be created a milk pool for that area. Milk in the pool is "pool milk" which is subject to the uniform minimum class price requirements of § 8c(5)(A) of the Act. With respect to that milk the producers receive the uniform blended pool price. It is fully equalized or "fully regulated" milk. Milk outside the pool is "non-pool milk" with respect to which uniform minimum class prices are not paid by handlers into the equalization fund, nor uniform blended pool prices paid by handlers to the producers. Non-pool milk is not fully equalized or regulated but, when shipped into the marketing area, "partially regulated" through the compensatory payments.

It is important that there be cleared up certain misunderstandings as to what the uniform minimum price provision in § 8c(5)(A) actually provides. Misunderstanding with respect to the provision is apparent in the opinion of the court in the *Kass* case.

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* In debating the legislation leading to the Act Senator Smith, Chairman of the Senate Committee on Agriculture and Forestry, unequivocally stated that "It does establish regions and regional prices." (79 Cong. Rec. 11299)

Milk is classified under each order according to how it is used. Under the present Federal Order, milk used strictly for fluid consumption, is Class I;* cream consumed in New York City and in neighboring counties in New York State, is Class II; all remaining uses, such as for the manufacture of butter, cheese and ice cream, are designated Class III. 7 C.F.R. § 927.37. A minimum price is established for each Class, Class I having the highest price, Class III the lowest. 7 C.F.R. § 927.40. Producers benefit directly in relation to the proportion of order pool milk that is sold as Class I.

The uniform minimum price for each class of milk in the milk pool is not an amount paid *to* producers of milk. It is an amount paid *for* milk of producers. It is paid not to them but to the equalization fund. It is paid in the sense that the pool handler accounts to the equalization fund for the uniform minimum price for each class use of milk that he sells. What the handler pays to the producer is the uniform blended pool price dealt with in § 8c(5)(B), not § 8c(5)(A). Whether a handler ever actually pays any money into the equalization fund, or on the contrary withdraws money from that fund, depends on whether the total of the uniform minimum class prices accounted for by him to the equalization fund is greater or less than the total of the uniform blended pool prices to be paid by him to producers.

In order to provide for a regional marketing area and its milk pool, the Secretary must draw some line of demarcation. He must determine what milk from

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* The Federal Order provides for two classes of fluid milk--Class I-A and Class I-B. The distinction between the two is not important here and, for simplicity, milk for fluid consumption is referred to as Class I.

what producers is to be within the pool and subject to full regulation, and, conversely, what milk from what producers is to be without the pool and so not subject to full regulation. Such determinations are made by the Secretary in his Order.

In the present Order the Secretary has made uniform minimum prices payable with respect to "milk received . . . from producers". 7 C.F.R. § 927.40. "Producer" is defined as "any dairy farmer whose milk is delivered from farm to a pool plant". 7 C.F.R. § 927.6. It is only for such milk that a handler has to account to the equalization fund at uniform minimum prices. Milk received from "dairy farmers" who are not "producers" as defined does not go to a pool plant and is not under the Order subject to the uniform minimum price requirement. By these Order provisions the Secretary has exercised his discretion as to what producers' milk is to be accounted for by handlers at the uniform minimum prices for the marketing area pool.

The validity of the Secretary's definitions and the necessity for them was recognized by the Court of Appeals below. The Court said (R. 905):

> "... This establishment of the Act on a regional marketing basis necessitates differentiation between pool and non-pool handlers. The Secretary of Agriculture following the letter and spirit of the statute has implemented this concept. He has conducted hearings and investigations to determine the need in certain regions for Milk Marketing Orders, and where called for has promulgated them. The pool handlers under those Orders are subject to full regulation. They must report to the Market Administrator in the region, must pay the uniform blend-price to producers and must ac-

count to the Producers Settlement Fund for their actual utilization of the Milk. The non-pool handlers are not subject to full regulation, are not required to pay the uniform blend price to their producers and do not have to account to the Producers Settlement Fund for their utilization of the Milk. Absent the compensatory payments, they are unfettered as to price, market and amount of distribution." [footnote omitted]

**B. The Purpose of the Compensatory Payment is to Maintain the Effectiveness of Minimum Class Pricing and Equalization.**

The problem which necessitates the compensatory payment provisions of the Federal Order is inherent in milk regulation on the basis of defined marketing areas and a marketwide pool. It is obvious, in light of modern transportation and refrigeration facilities, that regardless of where the Secretary fixes the boundaries of the marketing area and defines the milk in the pool, there will be sales of non-pool milk within the defined area. As the Secretary of Agriculture stated (18 F.R. 8447)*:

"... If that milk which is available and eligible for sale in the marketing area from farmers who are not producers and which consequently is unpriced and unpooled under the order is not regulated in some manner, however, the minimum class pricing and equalization provisions of the order would be rendered ineffective. In the absence of some suitable form of regulation of such unpriced milk there is always an artificial economic incentive for milk from non-producer sources to enter the marketing area and displace milk from producers. . . . The exclusion of such milk from the

* 44 USC § 307 states that "The contents of the Federal Register shall be judicially noticed".

> marketing area is not authorized or desirable. The only alternative method or device which has been suggested or proposed for dealing with the situation is to impose a suitable charge on such unpriced milk in an amount sufficient to neutralize, compensate for and eliminate the artificial economic advantage for non-pool milk which necessarily is created by the classified pricing and pooling of pool milk under the order."

When non-pool milk is sold as fluid milk in the marketing area, it is used as Class I. The Secretary found (18 F.R. 8450) that—

> "Non-pool milk so utilized would displace and force into Class III an equivalent amount of producer milk, thus precluding distribution of the returns from sales in the marketing area to those producers relied upon to produce an adequate supply of milk and cream for use in the marketing area."

The situation is as follows:

When pool milk is sold as Class I fluid milk the handler accounts to the equalization fund at Class I prices. When non-pool milk is sold as fluid milk in the marketing area, it should also command the Class I price. Further, it displaces an equal amount of Class I milk of pool producers. The displaced milk is forced into the surplus Class III category. The handler accounts for it to the equalization fund at the lower Class III price.

The obvious effect of this displacement of pool milk is to reduce the proportion of higher priced Class I milk and increase proportion of lower priced Class III milk for which pool handlers account to the equalization fund. The equalization fund thus loses the differ-

ence between the Class I price and the Class III price. It follows that unless the pool is compensated for this displacement, the uniform blended pool price of all of the milk in the pool will be reduced and the producers who regularly supply the marketing area will bear the loss.

The pool's loss becomes the non-pool handler's gain. The displacing milk of the non-pool handler is not accounted for by him to the equalization fund at any price and he retains the difference between the Class I price and the Class III price. By selling non-pool milk at the Class I price, instead of putting it in low return surplus utilization, the non-pool handler makes it profitable for a farmer not to pool his milk and to do so at the expense of pool producers. Were it not for the compensatory payment the non-pool handler would keep all of the difference between the Class I and Class III prices. He would be free to use it to compete with pool handlers in attracting the patronage of producers, or as additional profit for himself, or in part both. He would thus have all the advantages of selling in the marketing area and yet he and his producers would bear none of the burden of surplus milk. By requiring the non-pool handler to make compensatory payments to the equalization fund the Order offsets the adverse effect on pool producers. Without the compensatory payment the whole plan of minimum class prices and equalization would be rendered ineffective.

In spite of the fact that in the instant case the Court of Appeals and the District Court reached opposite conclusions on the validity of the compensatory payment provisions of the Federal Order, there was no disagreement between them with respect to the need for compensatory payments to protect the equalization

fund and the uniform blended pool price to producers. The Court of Appeals, in rejecting the theory of the *Kass* case which Lehigh and Suncrest urged upon it, described compensatory payments (R. 903) as—

> ". . . designed to compensate the pool for the loss of the Class I fluid milk utilization and they in turn protect the uniform blend price in the marketing area. We cannot, as urged by Lehigh and Suncrest, reasonably impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress." [footnote omitted]

When the case was before the District Court below, it described the sale of non-pool milk in the marketing area by Lehigh and Suncrest and others as a "fundamental threat to the regulatory scheme" contemplated by the Order. The Court stated (R. 215a):

> ". . . Thus, if non-regulated milk handlers (such as plaintiffs) are allowed to sell their milk in fluid form in the regulated area, they theoretically displace an equal volume of fluid milk sales which would ordinarily be made by fully regulated members. This automatically decreases the uniform unit price paid to all regular Order No. 27 producers for raw milk in the market area, since fluid milk sales produce the highest unit return of all classes of sales. Therefore *all* of the pool producers who regularly supply the Order No. 27 area feel this loss. If such sales become substantial enough they could disrupt the basic plan of regulation. At any rate they admittedly have a harmful effect upon every fully regulated producer under Order No. 27. . . ."

See also *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio, 1960), on appeal to the United States

Court of Appeals for the Sixth Circuit. In discussing the purpose of compensatory payments, the Court stated (p. 72):

> ". . . Fluid milk sold in the regulated area by non-pool handlers displaces fluid milk sales that otherwise would have been made by pool handlers, causing the latter to use more of their milk for manufacturing purposes (Class III), thus reducing the uniform blend price to the producers. The prospect of such results constituted a real threat to the integrity of the basic regulatory plan. . . ."

In *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939), this Court recognized that "considerable flexibility" is provided by § 8c(7)(D) of the Act and it gives opportunity "to include provisions auxiliary to those definitely specified". (p. 575) We submit that the compensatory payment is certainly an "auxiliary" to the fund; the payment is essential if the equalization fund is to operate in the manner contemplated by this Court in the *Rock Royal* case. It is clear that the Secretary has the power to regulate fully all milk produced for the marketing area. *Titusville Dairy Products Co.* v. *Brannan*, 176 F. 2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905. By partial regulation of non-pool milk through the device of compensatory payments, the Secretary has found an alternative to full regulation. Rather than constituting an obstruction to interstate commerce or a penalty on outside milk as Lehigh and Suncrest claim (Br. pp. 47-50), the compensatory payment device permits outside milk to come into the marketing area without disrupting the basic plan of milk regulation contemplated by the Act. The compensatory payment provisions of the Federal Order permit the flow of non-pool milk into the marketing area without the burden of full regulation and yet

afford protection to the producers who regularly supply the marketing area and who regularly carry the burden of surplus milk. The authority of the Secretary to provide such payments comes squarely within the scope of §8c(7)(D) as construed by this Court.

**C. It Is Not the Purpose of the Compensatory Payment to Equalize Costs Between Handlers of Pool Milk and Handlers of Non-Pool Milk.**

Lehigh and Sunerest contend that to be valid the imposition of compensatory payments must result in uniform prices or costs to both pool and non-pool handlers. Br., p. 34. They argue that the minimum prices "payable" by all handlers (i.e., their acquisition costs) must be uniform and that the provisions of the Federal Order are invalid because the price non-pool handlers pay for their milk, plus the amount of the compensatory payment, exceeds the prices the pool handlers pay for their milk. Br., pp. 35-38.

The Petitioners' argument rests entirely upon the erroneous concept of the purpose of compensatory payments as announced in *Kass* v. *Brannan*, 196 F.2d 791 (C.A. 2, 1952). In the *Kass* case (p. 796) the Court held (Judge Learned Hand dissenting) that the compensatory payment is a "part of" the uniform minimum price to be fixed under §8c(5)(A) of the Act. Further, the Court held that the price of non-pool milk (actually in the *Kass* case, milk products, cream and condensed milk) to the handler is composed of two elements: (1) the initial cost, i.e., the amount paid by the handler to the seller, and (2) the amount of the compensatory payment or "penalty", as the Court called it. Since the compensatory payment was based on the difference between the order

price for fluid milk and its value as surplus milk, and not on the difference between the order price for fluid milk and the actual initial cost to Kass, the Court concluded that the handler of non-pool milk had a total cost greater than the class price at which the handler of pool milk accounted to the equalization fund. That difference, the Court held, effected a discrimination barred by the uniform minimum price requirement of § 8c (5)(A) of the Act. It concluded that the compensatory payment provision of the order cannot be justified under § 8c(7)(D) of the Act.*

It is not the purpose of the compensatory payment to equalize costs between handlers of pool milk and handlers of non-pool milk for the folowing reasons:

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* The Court of Appeals for the Second Circuit is presently considering the validity of the compensatory payment provisions of Federal Milk Marketing Order No. 96 for the Springfield, Massachusetts, milk marketing area which are comparable to the provisions of the Order under review here. *Knudsen Bros. Dairy Inc.* v. *Benson*, Case No. 26698. The case is on appeal from the United States District Court for Connecticut and has been argued before the Court of Appeals. The District Court struck down the provisions of Order No. 96 on the authority of the *Kass* decision.

In *Lawson Milk Co.* v. *Benson*, 187 F. Supp. 66 (N.D. Ohio 1960), the Court refused to follow the reasoning of the Second Circuit. That case is on appeal to the Court of Appeals for the Sixth Circuit where a decision has been postponed pending the outcome of the instant case. The reluctance to follow the *Kass* doctrine is also apparent from the decision of the District Court in the case now under review. While the Court followed the *Kass* theory, it stated that it "might have reached a contrary result if initially called upon to interpret section 8c(5)". R. 224a.

(1) *The uniform minimum price provision of § 8c (5)(A) of the Act does not apply to non-pool milk and, therefore, a compensatory payment with respect to non-pool milk is not part of the uniform minimum price.*

Lehigh and Suncrest are not handlers of pool milk and they do not account to the equalization fund at any price for their milk. Neither are Lehigh and Suncrest required to pay for their milk at not less than the uniform blended pool price. Since the minimum pricing provisions of the Federal Order have no application to Lehigh and Suncrest, the requirement that they make compensatory payments into the equalization fund cannot be inconsistent with such Order provisions. Obviously, there can be no discrimination between pool and non-pool handlers under §8c(5)(A) under these circumstances.

The Court of Appeals below correctly interpreted §8c(5)(A) when it stated in its opinion as follows (R. 904):

> "We are also convinced that, in the light of the structure and avowed purpose of the Act, Section 8c(5)(A), has no application to non-pool handlers. Lehigh and Suncrest would have it that the Act makes no distinction between pool and non-pool handlers and that therefore the provision of Section 8c(5)(A) which states: 'Such price shall be uniform as to all handlers,' guarantees them a cost equal to that of pool handlers But there is not the slighest indication that Congress used the language of Section 8c(5)(A), with the thought of providing for equalized costs between pool and non-pool handlers and thereby stifling the effectiveness of the whole plan . . ." [Footnote omitted]

(2) *A handler's initial cost, i.e., the amount paid the seller, is not a factor in prescribing uniform minimum prices.*

Even if the uniform minimum price requirement did apply to non-pool milk, the handler's initial cost is irrelevant in computing that price. Uniform minimum class prices do not fix the initial cost to the handler, i.e., what he pays for his milk, but only the amount paid or accounted for by handlers to the equalization fund. If uniform minimum prices were to represent handlers' costs, a minimum class price would rarely be uniform. It would vary with each handler for the Act does not prohibit paying more than the minimum class price. Handlers frequently pay a premium for their milk. This is true whether the handler's milk is pooled or is not pooled. In case of premiums the handler, if his milk is pooled, still pays or accounts to the equalization fund for his milk at the uniform minimum class prices, but pays the producer the uniform blended pool price plus the premium. No one would seriously contend that the requirement of uniform minimum prices is not met in such a situation. If the handler's milk is not pooled, he does not account for it to the equalization fund at the uniform minimum class prices and does not pay the dairy farmer the uniform blended pool price, but pays whatever price the handler and the dairy farmer agree on. It is apparent that in the case of a marketing area pool the administration of uniform minimum prices based on handlers' costs would be impossible.

Furthermore, if non-pool handlers' costs were to be used as a basis for determination of compensatory payments, it would permit such handlers completely to avoid compensatory payments by paying to their farmers additional sums representing amounts which other-

wise would be paid into the equalization fund. This would usually result in the lowering of the uniform blended pool price and in the non-pool dairy farmers receiving prices for their milk considerably in excess of the uniform blended pool price to producers. Such result would create disorderly marketing contrary to the declared policy of §1 of the Act.

(3) *A compensatory payment for the purpose of equalizing costs between pool and non-pool handlers would be beyond the statutory authority of the Secretary.*

Section 8c(5)(A) of the Act makes no mention of equalizing handlers' costs. It specifies uniform minimum class prices at which pool handlers account to the pool for milk purchased from producers which, in turn, determine the uniform blended pool price paid by pool handlers to producers. Since the non-pool handler, such as Lehigh or Sunerest, does not have to account to the pool at uniform class prices nor pay for his milk the uniform blended pool price, his uncontrolled cost price is unrelated to the controlled uniform blended pool price. Lehigh and Sunerest seek to make applicable to them the requirement for uniform minimum class prices to which they are not subject and which is not a basis for arriving at the price they pay their farmers.

The Act does not require the equalizing even of producers' costs. Guernsey milk was found by a District Court to have a greater cost of production than average milk. It was urged that the uniform blended pool price paid to producers under § 8c(5)(B) of the Act should recognize this by a differential for Guernsey milk. The Court of Appeals for the Second Circuit held that "producer costs or marketability are not in themselves factors to influence milk prices". *New*

*York State Guernsey Breeders' Co-Op., Inc.* v. *Wickard,* 141 F.2d 805 (C.A. 2, 1944). It is implicit in that Court's opinion that farmers' costs are not a part of the minimum blended pool prices paid to pool producers even though such prices—as distinguished from costs—are required to be "uniform" under §8c(5)(B).* Correspondingly, equalizing handlers' costs is no part of the minimum class prices which are required to be "uniform" under §8c(5)(A).

For the foregoing reasons the Court in the *Kass* case misconstrued the meaning of §8c(5)(A) of the Act and as a result reached erroneous conclusions with respect to the purpose of the compensatory payment and the authority of the Secretary of Agriculture under §8c(7)(D) of the Act.

The Court of Appeals for the Third Circuit correctly refused to follow the *Kass* decision in the instant case. Its reasoning in rejecting the *Kass* theory is expressed as follows (R. 902):

> "The Kass opinion assumes that the minimum class price provision of Section 8c(5)(A) is designed to equalize the actual costs of milk to all handlers distributing milk in the marketing area. And Lehigh and Suncrest assert in their brief:
>
> "'The result sought to be achieved by Congress in this section [8c(5)(A)] was that through the device of class prices *all handlers' costs for milk utilized in the marketing area should be uniform* so that no one group of handlers could enjoy an unfair advantage or suffer an unfair disadvantage.' [Emphasis supplied.]

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* Recognition of differences in producers' costs was urged only under the "grade or quality" exception to the uniform blended pool price (Act, § 8c(5)(B)). The Court found even this exception inapplicable (p. 810).

This interpretation misconceives the plain language of the section and suggests a policy not contemplated by Congress.

"Section 8c(5)(A) of the Act makes no reference to equalizing either fully regulated or partially regulated handlers' costs. It provides solely for uniform minimum class prices for which the pool handlers must account to the Producers Settlement Fund. Nor does it take account of the initial cost of milk to handlers. As has been recognized by the Supreme Court, Section 8c(5)(A) does not prevent the pool-handler from paying a premium to producers for milk over and above the uniform blend price. However, his accountability to the Producers Settlement Fund would still be measured by the use class prices fixed by the Market Administrator under Section 8c(5)(A). Stark v. Wickard, 321 U.S. 288, 303 (1944). These latter prices are based on the use value of the milk. Neither fully regulated nor partially regulated handlers' initial costs are involved. Lawson Milk Company v. Benson, 187 F.Supp. 66, 73 (N.D. Ohio 1960)." [Footnote omitted]

**D. The Amount of the Compensatory Payment Corresponds to Its Purpose.**

The Secretary found that the amount of the compensatory payment should be computed on the basis of the difference in value of fluid and surplus milk and that the amount should be graduated in accordance with the supply of fluid milk available for the marketing area.

The Secretary's findings and conclusion in connection with the 1953 amendments to the Order are set forth at length in the Federal Register (18 F.R. 8445-8451). Without more, the findings show that the amount of compensatory payment is a matter for the Secretary's informed discretion. The Judicial Officer,

the District Court below, and the Court of Appeals for the Third Circuit, each found that the compensatory payment provision is supported by the evidence of record.

The amount of the compensatory payment set by the Secretary is reasonable and corresponds to its purpose of compensating the equalization fund for the loss due to displacement of pool milk by non-pool fluid milk sales in the marketing area. We have already shown that when non-pool milk is sold as Class I fluid milk in the marketing area an equal amount of pool milk is forced into the lower Class III utilization, and that since the pool handler's obligation to the equalization fund is determined on the basis of the Class III minimum price, the equalization fund loses the difference between the Class I and Class III prices. We have also shown that since the non-pool handler is not required to account to the equalization fund, he is, in the absence of a compensatory payment, at a competitive advantage over the pool handler to the extent of the difference between the Class I and Class III prices. Under these circumstances, the measure of the payment is quite logically based upon the difference between the Class I price at which the displaced milk would have been sold, but for the displacement, and the Class III price at which it is sold. By measuring the amount of the compensatory payment in this manner the Federal Order compensates the equalization fund for the displacement. At the same time it removes the competitive advantage which the non-pool handler would otherwise have over the pool handler or his producers would have over pool producers.

While the compensatory payment, in maintaining the effectiveness of the pricing and pooling plan, brings about substantial equity between pool and non-pool handlers (R. 752a), it is not designed to equalize handlers' costs and the amount of the payment should not be based on handlers' costs. In fact, as pointed out by the Court of Appeals below, to measure compensatory payment by using the *Kass* formula of equalized costs would be "repugnant to the *express* purpose set forth in the Act itself" and would "impair the integrity of the regional marketing scheme, since the compensatory payments would bear no relation to the loss of Class I fluid milk utilization in the marketing area". In contrast, the measure of the compensatory payment, as provided for in the Order, complements the regional marketing idea. R. 903.

The reasonableness of the amount of the compensatory payment is evident from the fact that the payment is required to be made only when Class I pool milk is displaced by non-pool milk. In periods when there is a shortage of Class I milk in the pool, with the result that the sale in the marketing area of non-pool milk as fluid milk does not displace pool milk, the compensatory payment is not required.* The equalization fund is compensated only when it does suffer loss from displacement of Class I pool milk.

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* Thus, 7 C.F.R. § 927.83 states in the first proviso as follows:

"That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of Class I-A and Class II milk used in such computation, the [compensatory] payments set forth in this section shall not be required."

**E. The Secretary Has Not Acted Arbitrarily in the Regulation of Non-Pool Milk Sold in the Marketing Area.**

The history of the Federal Order demonstrates that the Secretary has been reasonable and conscientious in the exercise of his authority under § 8c(11)(A) of the Act to prescribe milk regulation on a regional basis. In the light of experience, the determinations of the Secretary as to pool and non-pool milk have varied over the life of the Order:

(1) *Milk Subject To Pooling.*—(a) Under the Federal Order as originally promulgated in 1938, all milk delivered by producers to a plant approved by a health authority of the marketing area was required to be accounted for by handlers to the equalization fund at the uniform minimum class prices, and producers of that milk were paid the uniform blended pool price. An exception was made of milk from an approved plant that was marketed outside the marketing area. This milk was unpriced and so on it no payments at the uniform minimum class prices were accounted for to the equalization fund. This system was held valid by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.,* 307 U.S. 533 (1939).

(b) In 1941 the excepted milk was partially priced, instead of unpriced, and the handler had to account for it to the equalization fund at the partial prices but not at the uniform minimum class prices. The system as so modified was held valid in *Titusville Dairy Products Co.* v. *Brannan,* 176 F.2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905.

(c) In 1945 a new concept of pool and non-pool plants was developed. Designation as a pool plant was based on shipment of, or ability and willingness to ship, fluid milk into the marketing area. *Kass* v.

*Brannan*, 196 F.2d 791 (C A. 2, 1952). This pool plant basis of distinguishing between pool and non-pool milk is still in effect. Only pool plant milk is in the milk pool and accounted for at the uniform minimum class prices. The validity of this system of differentiation is not at issue in this case, nor was it in the *Kass* case.

(2) *Milk Not Subject To Pooling.*—(a) Under the health-authority-approved-plant delineation, milk from non-approved plants was barred from the marketing area by health authorities and so was not pooled.

(b) Under the pool plant delineation milk from non-pool plants is not pooled but neither is it barred from the marketing area. It is permitted access to that area. However, a compensatory payment has to be made with respect to it. The payment is based on the difference between the fluid value and the surplus value of the milk. 7 C.F.R., 1945 Supp., §§ 927.8(e) and 927.9(h). This provision was held invalid in the *Kass* case.

(c) In 1953 extensive hearings were held by the Secretary and extensive findings and conclusions made by him supporting the compensatory payment provisions. 18 F.R. 8444 ff. Also, under the 1953 amendments the amount of the compensatory payment is reduced when the varying seasonal supply of fluid milk for the marketing area becomes short.

(d) Under the amendment effective August 1, 1957, extending the marketing area to northern New Jersey and upper New York State, all milk from non-pool plants was subject to compensatory payments, as theretofore, when shipped into the marketing area. However, a plant otherwise a non-pool plant and having 55 per cent or more of its milk classified as fluid milk, had the option of being designated as a pool plant and

thereby subject to full regulation rather that to compensatory payments.

(e) Under the amendment to the Order effective September 1, 1958, (7 C.F.R. §927.29) fringe plants distributing in part in the marketing area, 55 percent or more of whose milk is classified as fluid milk, were made pool plants and so not subject to compensatory payments but to full regulation. A handler could elect, however, to have his pool plant designated a non-pool plant. 23 F.R. 6053. In the event of such election, but not otherwise, the handler becomes subject to the compensatory payments. Sunerest and Lehigh have for each month since September 1, 1958, elected compensatory payments in lieu of full regulation as pool plants (R. 893, 895).

Obviously the Secretary has not been inflexible or failed to give exhaustive consideration to the problem of milk subject to pooling (full regulation) and that not subject to pooling (partial regulation). The problem of drawing such a line cannot be avoided since, as required by the Act, milk orders are required to be a regional area basis, and a pool must be established for that area.

Congress was fully aware of the system of partial regulation adopted by the Secretary and made no change in the Act to outlaw it. Following the decision in the *Kass* case, Congress conducted a study of the problems of the milk industry during the course of which the Secretary's use of compensatory payments in Federal milk marketing orders was fully explained. *Study of the Dairy Industry,* Hearings Before The Subcommittee On Dairy Products Of The Committee On Agriculture, House of Representatives, 84th Con-

gress, 1st Sess., pp. 1-31. The failure of Congress to enact legislation "is at least some evidence of Congressional approval of the administrative interpretation". *Laycock* v. *Kenney*, 270 F. 2d 580, 589 (C.A. 9, 1959). Such a long-continued administrative interpretation must be given great weight. *United States* v. *Bergh*, 352 U.S. 40 (1956).

**F. The Disposition of a Compensatory Payment Conforms to Its Purpose.**

Lehigh and Sunerest argue that the compensatory payment provisions of the Federal Order are contrary to the plain Congressional intent because non-pool handlers are required to contribute a "gratuity" to the equalization fund measured by the difference between the Class III and the Class I minimum prices established for pool milk. They argue that such disposition goes to the benefit of producers who had nothing to do with production of the milk. Br., p. 29.

Compensatory payments can hardly be characterized as "gratuities". The Record shows that the Judicial Officer, the District Court and the Court of Appeals below each found that the payments are necessary to the regulatory scheme. R. 226a-228a, 906. It has also been shown that the purpose of requiring a compensatory payment when outside milk is sold in the marketing area is to maintain the minimum price structure required by the Act and to compensate the equalization fund for the displacement sale of Class I pool milk in the marketing area. It follows, therefore, that payment to the equalization fund is the only logical disposition to be made of compensatory payments. Unless Lehigh and Sunerest pay the compensatory

payment into the equalization fund they or their producers, or both, benefit at the expense of pool handlers and pool producers. On this point the Secretary found (18 F.R. 8450):

> "The fact that this displacement loss to the pool does occur whenever non-pool milk is used in Class I-A or II does, however, provide an additional reason for imposing some charge on the non-pool milk and clearly justifies the addition of such payments to the common pool as partial compensation for the displacement loss suffered by the pool. . . . A fundamental purpose of the order is to fix a schedule of prices for pool milk which will (1) insure that a sufficient and dependable supply of quality milk will be available for Class I-A and Class II needs of the market, and (2) be in the public interest. To the extent that such sales are displaced through the disposition of surplus milk from unpriced sources, producers lose income from sales in the market which they are expected to supply. Producers would not realize the income from the sale of their milk which the order is designed to provide at the class prices established. Such loss of income unless otherwise compensated for would necessitate higher class prices, at the ultimate expense of consumers. Otherwise, the maintenance of an adequate supply of milk for the market would be jeopardized. The addition of compensation payments to the producer settlement fund is an appropriate method of compensating, insofar as possible, producers relied upon to supply the market for a loss of income which they would otherwise incur . . ."

It is wholly appropriate for the compensatory payment to be paid into the equalization fund to compensate for the loss suffered by that fund through the

marketing of non-pool milk in the marketing area. By characterizing compensatory payments as "gratuities", Lehigh and Sunerest imply that they pay something into the equalization fund and receive nothing in exchange. The same complaint could be made by any pool handler whose percentage of fluid milk sales are so high that he must contribute to the equalization fund. If the argument were valid, such a handler could rightfully refuse to make payments into the equalization fund with respect to his fluid milk sales and thereby defeat the entire scheme of milk regulation. The argument of Lehigh and Sunerest conflicts with the basic concept of pooling milk sales to accomplish the payment of the minimum uniform blended pool price and the maintenance of stable marketing conditions sought by the Act.

The objection which Lehigh and Sunerest make to the disposition of the compensatory payments was considered by this Court in *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533 (1939). There the constitutionality of the equalization fund was attacked. It was asserted that the pooling requirement of the Order was a deprivation of liberty and property in that it deprived the handler of the right to pay a producer at the minimum class price in accordance with the use of his particular milk and required the handler to distribute the difference between the minimum class price and the uniform blended pool price through the equalization fund to those producers whose milk was resold less advantageously. The Court rejected this argument (p. 572) holding that the pool is a reasonable device to minimize the results of restrictions and that it is designed to protect interstate commerce by smooth-

ing out the difficulties of the surplus and cut-throat competition.*

The Court's reasoning is equally applicable to the disposition of the compensatory payment. As already indicated, the compensatory payment is necessary and incidental to the pricing provisions of the Order. If Lehigh and Suncrest were allowed to pay the difference between the Class I and Class III prices to their producers rather than to the equalization pool and if this practice were extended to all non-pool handlers and then in fairness in turn to pool handlers selling fluid milk in the marketing area, it is obvious that the effectiveness of the pool, which the Supreme Court recognized as so necessary to the price regulatory scheme, would be jeopardized.

### III. LEHIGH AND SUNCREST ARE ESTOPPED FROM CONTESTING THE VALIDITY OF THE PRESENT COMPENSATORY PAYMENT PROVISION.

Lehigh and Suncrest at all times here pertinent have had an election under the Federal, New York and New Jersey Orders as to whether their plants supplying milk to the marketing area should be pool or non-pool plants. If pool plants, they would be fully regulated under the Orders. All sales of milk, no matter where made, would become subject to the uniform minimum class price and equalization provisions of the Orders and the handlers would be required to pay the uniform blended pool price to the producers. If non-pool plants, they would be only partially regulated under the Or-

* Rock Royal Co-Operative, Inc., it should be noted, is represented by Mutual Federation of Independent Co-operatives, Inc., one of the *amici curiae* filing this brief. If Lehigh and Suncrest are allowed to prevail here, they will be permitted to do that which was denied Rock Royal Co-Operative, Inc., namely payment of amounts to their producers rather than into the equalization fund.

ders. The milk would not be subject to the uniform minimum class price, equalization, and uniform blended pool price provisions of the Orders. The handler would be free to retain the benefits of his outside sales and have only his sales within the marketing area regulated through compensatory payments. It becomes an economic choice for the handler, whether he would be better off financially through such limited partial regulation as is offered to him or to remain fully regulated.

Lehigh and Sunerest elected to have their plants treated as non-pool plants and to make the compensatory payments. Having done so, they may not contest the validity of the Order provisions for those payments. Lehigh and Sunerest contend that they had no "free option" and "no opportunity for free choice". Br., pp. 51, 52. Our position is that Lehigh and Sunerest were free as to the choice they might make and elected the status they determined was to their economic benefit.

During the period August 1, 1957, to September 1, 1958, the Orders provided that if at least 55% of the milk received at a non-pool plant was classified as fluid milk, then the handler could elect to have his plant become a pool plant. 7 C.F.R. §927.29(d). Thereby, compensatory payments could be avoided. During this period neither Lehigh nor Sunerest exercised the option to have their plants become pool plants but retained the status of non-pool plants. Because of the change in Lehigh's method of marketing in August 1957 (shortly before this litigation was instituted in the Department of Agriculture), Lehigh was not in a position to exercise the option of having its plants become pool plants. R. 831a-832a, 322a-326a.

Effective September 1, 1958, the pool plant election provision of the Federal Order was amended. The New York and New Jersey Orders were similarly amended. Since that date a plant is automatically a pool plant for any month if at least 55% of the milk received from producers at the plant during such month is classified as fluid milk. The handler, however, is given the option of electing to have the plant become a non-pool plant and to make the compensatory payments in lieu of full regulation. 7 C.F.R. § 927.29(d) as amended effective September 1, 1958. Lehigh and Sunerest so elected under the following circumstances:

The Act (§8d(1)) requires all handlers subject to a milk marketing order to make reports that the Secretary determines to be necessary to carry out the order and effectuate the policy of the Act. The Federal, New York and New Jersey Orders (7 C.F.R. §927.50) require all handlers to make a monthly Plant Report with respect to the milk received at their plants, whether the plants are pool or non-pool plants. Lehigh and Sunerest failed and refused to make these Reports. R. 190a. The District Court in its temporary injunction order, *pendente lite*, of October 4, 1957 (R. 192a) directed that Lehigh and Sunerest make all Reports required by the provisions of the Federal Order beginning August 1957. Lehigh and Sunerest thereupon made the required Reports. In September 1958 the monthly Plant Report prescribed by the Market Administrator for all handlers marketing milk in the marketing area, pursuant to the amendatory provisions of the Federal, New York and New Jersey Orders, contained an election provision. R. 893-896. In the Report under the heading "Method Of Election" it was then, and still is, provided that:

> "If the plant being reported meets the specifications of §927.29(d) it shall be a pool plant unless the following election is signed by the handler:
>
> " 'The undersigned handler hereby elects to have this plant not designated a pool plant and to make payments into the producer settlement fund as provided in §927.29(d)'."

For September 1958 and for each month thereafter Lehigh and Sunerest have affirmatively elected to have their plants treated as non-pool plants and to make the compensatory payments. It is true that the District Court directed that Lehigh and Sunerest file Plant Reports the same as all other handlers but there was no direction as to whether they should or should not elect to have their plants treated as non-pool plants.* Lehigh and Sunerest were not "involuntarily subjected" (Br., p. 51) to compensatory payments by the District Court Order.

Partial regulation is a privilege, not a "penalty" as asserted by Lehigh and Sunerest. If Lehigh and Sunerest had not elected for each month since September 1, 1958, to be non-pool plants, they would have remained pool plants and in a position of precise, identic equality with other handlers whose pool plants were fully regulated under the Federal Order. There is no

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* The amendatory provisions of the Federal Order effective September 1, 1958, permitting a handler affirmatively to elect to have his plants become non-pool plants, were adopted subsequent to the institution of these proceedings before the Judicial Officer of the Department of Agriculture and to the filing of the complaints and answers in the District Court. Lehigh and Sunerest, nevertheless, urge the invalidity of compensatory payments under the present provisions of the Order permitting them to elect non-pool plant status as well as under the former provisions of the Order. The District Court dealt with the present amended provision in its final opinion and held it invalid. R. 228a-229a.

question but that the Secretary in his Order may fully regulate such peripheral handlers as Sunerest and Lehigh. Full regulation, i.e., accounting by the handler to the equalization fund at the uniform minimum class prices for all milk received at a plant and payment by the handler of the uniform blended pool price to the producers of that milk,—has already been sustained. *Titusville Dairy Products Co.* v. *Brannan*, 176 F.2d 332 (C.A. 3, 1949), cert. den. 338 U.S. 905. See also, *United States* v. *Rock Royal Co-Operative, Inc., et al.*, 307 U.S. 533.

Lehigh and Sunerest seek to avoid all regulation. They seek to avoid full regulation, which is unquestionably valid, by electing the option of partial regulation through compensatory payments. They then, in turn, assert that such elected partial regulation is invalid. They may not be heard to make this assertion.

Lehigh and Sunerest are not entitled to have the courts pass on the validity of a provision that they find economically preferable and consequently have elected to accept. For example, one may not elect to come under an Act and then question its constitutional validity. *Booth Fisheries Co.* v. *Industrial Commission*, 271 U.S. 208, 210-11 (1926). If one uses an Act to gain advantages, he is estopped to question the validity of its vital conditions. *Fahey* v. *Mallonee*, 332 U.S. 245, 255-6 (1947); *J. H. Crain* v. *United States*, 104 Ct. Cls. 713, 738-9 (1945). The same principle applies where a regulation, order, or other administrative action is involved, rather than a statute. *Callanan Road Co.* v. *United States*, 345 U.S. 507, 513 (1953); *Commissioner of Internal Revenue* v. *National Lead Co.*, 230 F.2d 161 (C.A. 2, 1956), aff'd. on other grounds, *National Lead Co.* v. *Commissioner*, 352 U.S. 313 (1956). In

*Varnell* v. *Hillsborough Packing Co.*, 70 F.2d 435, 438 (C.A. 5, 1934), it was held that a handler who at his election signed a marketing agreement under the Act presently being considered could not obtain an injunction against enforcement of an order issued under the marketing agreement.

**IV. IN THE EVENT THE PRESENT COMPENSATORY PAYMENT PROVISION IS HELD INVALID, LEHIGH AND SUNCREST WOULD BE SUBJECT TO FULL REGULATION UNDER THE ORDER COMMENCING SEPTEMBER 1, 1958.**

The District Court in its opinion took the position that if the compensatory payment provision in effect prior to September 1, 1958, is invalid, then the present provision for full regulation, unless the option of non-pool plant status and compensatory payments is exercised, must also fall. The District Court concluded that Lehigh and Suncrest were "forced" to elect the present compensatory payment provision "since the economic burden of full regulation would be even greater". Nevertheless, the court conceded, citing the *Titusville* case, that the Secretary could enforce full regulation upon the handlers "by an appropriate order".

The present Order adopted after extensive hearings, findings, and conclusions (23 F.R. 6050) does appropriately and validly subject handlers to full regulation, including Lehigh and Suncrest, but gives Lehigh and Suncrest an alternative, not given all handlers, of making compensatory payments. If the present compensatory payment provision is held invalid, then the unquestionable valid provision for full regulation remains in effect and Lehigh and Suncrest remain subject to it. The District Court stated that "we do not feel" that the Secretary intended to enforce full regu-

lation upon a handler in such event, and "We flatly reject this conclusion". The court gave no reason for its view. Elsewhere in its opinion the court said (R. 227a-228a):

> "Sales of fluid milk in the area by non-regulated handlers impose a fundamental threat to this adequate amount of return. If unchecked, they could seriously disrupt the whole regulatory plan."

If the provision that Lehigh and Suncrest have elected to accept is held invalid, that does not carry with it the invalidity of the full regulation provision which the two handlers seek to avoid. Full regulation is valid and the provision for full regulation and the elective compensatory payment provision are separable. There is no basis for any conclusion that the Secretary intended that Lehigh and Suncrest should escape all regulation and to the detriment of producers whose milk is pooled, be placed in a preferred competitive position compared with other handlers marketing milk in the New York-New Jersey milk marketing area. To the contrary, the Secretary's serious concern about the destructive effect which the sale of non-pool milk would have in the marketing area without partial regulation makes it clear that the Secretary intended that if partial regulation through compensatory payments was not possible, then full regulation of fringe handlers would be imposed. Lehigh and Suncrest's attack has the objective of escaping all regulation.

### V. THE ARGUMENT THAT THE COMPENSATORY PAYMENT PROVISIONS OF THE ORDER VIOLATE § 8c(5)(G) OF THE ACT IS NEITHER TIMELY NOR VALID.

Lehigh and Suncrest contend that the compensatory payment provisions of the Federal Order are in conflict with §8c(5)(G) of the Act and prohibit the flow of milk in interstate commerce. Br., pp. 47-50. The

argument presents an issue which was not considered and passed upon by the Court of Appeals, the District Court, or the Judicial Officer. Accordingly, Lehigh and Sunerest are precluded from having this issue reviewed by this Court. *McCullough* v. *Kammerer Corp., et al.* 323 U.S. 327 (1945); *De Sylva* v. *Ballentine*, 351 U.S. 570 (1956)

Assuming for the sake of argument that the issue is properly before this Court, it is respectfully submitted that the compensatory payment provisions of the Federal Order are not invalid under §8c(5)(G) of the Act.

Lehigh and Sunerest rest their argument upon the case of *Hood and Sons* v. *DuMond*, 336 U.S. 525 (1949), which they allege "dealt with an analogous situation". Br., p. 48. In the *DuMond* case this Court held that the action of the New York Commissioner of Agriculture and Markets in denying a license to the Hood Company to expand its facilities was in violation of the commerce clause of the Federal Constitution. That situation is not at all analogous to the circumstances here. In the *DuMond* case the regulation was the sole result of state action. Here the regulation is the result of a joint and concurrent action by the Secretary of Agriculture, the State of New York and the State of New Jersey. This difference is significant. Referring to the memorandum setting forth the principles of cooperation between the Federal and New York authorities (see Appendix A of the brief *amicus curiae* filed by the State of New York), the Court observed (p. 542):

> "But no federal approval or responsibility for the challenged features of this order appears in any of these provisions or arrangements. The

> 'memorandum of the principles of cooperation' relates only to marketing areas in New York, while the marketing area served by Hood is entirely outside of New York and is controlled by Federal Order No. 4, applicable to the greater Boston market. Federal Order No. 27 is applicable to the New York metropolitan market and it is as to this order that the State of New York is recognized by the memorandum as entitled to consultation. There is no such financial support as was given in *Parker* v. *Brown*, 317 U.S. 341."

The plain language of §8c(5)(G) of the Act differentiates between milk and milk products so far as the authority of the Secretary is concerned. With respect to milk the Secretary cannot "prohibit" the marketing in the marketing area of milk produced in any production area in the United States. So far as milk products are concerned, he cannot "in any manner limit" such marketing.

The legislative history of the Act shows that by the use of the word "prohibit" Congress did not intend to render the Secretary powerless to impose restrictions on fluid milk in interstate commerce. During the debate in the House of Representatives, Representative Andresen offered an amendment to add the following paragraph (G) to §8c(5):

> "(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit the marketing in that area of any milk or product thereof produced in any production area in the United States."

Representative Sauthoff then offered an amendment to Andresen's amendment which would have used the words "limit or tend to limit" in lieu of the word "prohibit". Sauthoff's amendment would have applied to

milk, as well as milk products. Congressman Jones, Chairman of the Agricultural Committee, objected to the Sauthoff amendment although he had no objection to Andresen's amendment. He stated his position as follows (79 Cong. Rec. 9572):

> "I am perfectly willing to adopt . . . [Andresen's amendment] . . . because that simply treats all areas alike for you could not prohibit someone from an outside area coming in so long as he complied with the conditions prescribed for that area; *but if you said that no restrictions or limitations could be required it would wreck the program, it would destroy every vestige of a program we have for milk.*" [Emphasis added.]

The Sauthoff amendment was defeated but when the bill reached the Senate language similar to the Sauthoff amendment was added which would have prevented the Secretary from limiting in any manner marketing of fluid milk. The present provisions of §8c(5)(G) are the same as those reported by the Senate and House conferees. The explanation of their action contained in the Conference Report clearly indicates their intention to draw a distinction between the authority of the Secretary with respect to fluid milk and his authority with respect to milk products. The explanation follows (H. Rept. No. 1757, 74th Cong., 1st Sess., p. 21):

> "Amendment No. 24: Under the House bill, no marketing agreement or order applicable to milk and its products in any marketing area could *prohibit the marketing in that area of any milk or product thereof* produced in any production area in the United States. The Senate amendment extended this provision so that no marketing agreement or order so applicable could *limit in any manner the marketing in the marketing area of milk or its products* produced anywhere except that cer-

tain limitations on the marketing of milk were specifically permitted. The conference argreement retains the House provision with respect to *prohibitions on marketing of both milk and products of milk.* The conference agreement also denies the authority to limit in any manner the marketing in any area of milk products (butter, cheese, cream, etc.) produced anywhere in the United States. The language adopted by the conference agreement does not refer to milk, *and so does not negative the applicability to milk, for use in fluid form or for manufacturing purposes, of the provisions of the bill relating to milk, such as the provisions on price fixing, price adjustment, payments for milk,* etc." [Emphasis added.]

When the House was considering the Conference Report a question arose with respect to the meaning of §8c(5)(G). The explanation which followed demonstrates that Congress was fully aware that regulation of milk on a regional basis as contemplated by the Bill would require some restrictions with respect to milk coming into the marketing area from outside sources. It also shows that Congress was cognizant of the fact that the decision of this Court in *Baldwin* v. *Seelig,* 294 U.S. 511 (1935), left the several states powerless to prescribe effective regulation in an interstate milk marketing area. These were real problems and Congress intended the Secretary of Agriculture to have power to deal with them. In response to the question of how the provisions of §8c(5)(G) would change the existing law, Congressman Jones said (79 Cong. Rec. 13022):

"Mr. Jones. The provisions of this particular bill would enable that area to be protected from being swamped with fluid milk from the outside, bought at any old price. For instance, if you do

not have the protection of this bill they would run into the same trouble they ran into in the New York milk cases, where they went into New Hampshire and bought milk at a lower price and came in and broke down your milk agreements. Under the provisions of this bill if a price were fixed in this particular area in New York, then if anyone bought milk from an outside area and brought it in he would be compelled to pay the producer the same price that was being paid the producers within the area *and comply with all regulations and requirements of that area.* For the first 2 months he would be required to take the manufacturer's price." (Emphasis added.)

It should be noted that Congress did not intend to confine the authority of the Secretary of Agriculture to meet this problem to the so-called "new producer" provisions of §8c(5)(D) of the Act. Representative Jones had something more in mind in stating that the handler of outside milk would be compelled to comply with "all regulations and requirements of that area". Immediately following the explanation by Representative Jones, Representative Hope asked this series of questions further illustrating that the authority of the Secretary under §8c(5)(G) permits the imposition of restrictions on outside milk:

"Mr. Hope. Is not this the change this amendment makes? Under the original Agricultural Adjustment Act power was given the Secretary of Agriculture to prescribe any rules or regulations which he might care to respecting the introduction of milk into any particular area; that is, bringing in milk from the outside.

"Mr. Jones. But the original amendments did not permit any orders governing the price to the producers?

"Mr. Hope. No; but otherwise the Secretary could make orders which would regulate the bringing in of milk from the outside into any particular milkshed, but under the amendments we are now considering the Secretary's power is limited. He cannot prohibit milk from coming in?

"Mr. Jones. That is correct.

"Mr. Hope. But he can prescribe some limitations?

"Mr. Jones. Yes; and he cannot prohibit the products of milk being brought into any area.

"Mr. Hope. No; but he can prescribe limitations on the importation of fluid milk.

"Mr. Snell. Then, as far as fluid milk is concerned, it is protected in certain markets, but, as far as the other products are concerned, they are not protected.

"Mr. Jones. That is correct."

As we indicated at the outset of our argument, the validity of the contested provisions of this Federal Order should be determined in light of the joint Federal-State program of milk regulation, a program which admittedly was designed for the benefit of producers. We are not dealing here, as was this Court in the *DuMond* case, with state action only in an area delegated to the province of the Federal Government. Here, both Federal and state governments have joined together to handle a problem which has been described by the District Court below as a "fundamental threat to the regulatory scheme". R. 215a

When viewed in light of the fundamental objectives of the Act and the regulatory scheme, the argument of Lehigh and Sunerest cannot be accepted. The record shows that Lehigh distributes approximately 4% and Sunerest approximately 5% of their milk in the marketing area covered by the Federal Order. The gist of their argument is that even as to this small percentage

of business they should be relieved of all regulation. In doing so, they would strike down reasonable regulations which have been found necessary to effectuate the Act by the Judicial Officer, the District Court, and the Court of Appeals below. The Court of Appeals below refused to interpret § 8c(5)(A) to "impute to Congress a policy in one section of the Act that would directly conflict with the comprehensive regulatory undertaking of the complete Act as conceived by Congress". R. 903. Having failed in that attack on the Federal Order, Lehigh and Sunerest now urge a construction of § 8c(5)(G) which also conflicts with the scheme of regulation contemplated by the Act. It, too, should be rejected. Clearly, the authority of the Secretary is not so limited by § 8c(5)(G) or any other provision of the Act.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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## SUPPLEMENT A

**Extracts From New York State Order for the New York-New Jersey Milk Marketing Area**

Order No. 126

State of New York

DEPARTMENT

of

AGRICULTURE AND MARKETS

Division of Milk Control

Revised Official Order No. 126

*Sec. 927.3 Marketing area.* "New York-New Jersey milk marketing area" (hereinafter called the "marketing area") means all of the territory within the boundaries of the city of New York, and the counties and parts of counties set forth in paragraphs (a) and (b) of this section together with all piers, docks, and wharves connected therewith, and all craft moored thereat, and including territory within such boundaries which is occupied by Government (Municipal, State, Federal, or International) reservations, installations, institutions, or other establishments.

*(a)* The city of New York and counties of Nassau, Suffolk (except Fisher's Island), and Westchester in the State of New York (such territory being referred to hereinafter as the "New York metropolitan district").

*(b)* The following counties and parts of counties in the State of New York: Albany; Broome; Cayuga (except the townships of Sterling, Victory, Conquest, and Montezuma); Chemung; Chenango; Columbia; Cortland; Delaware; Dutchess; that part of Essex consisting of the townships of Schroon, Ticonderoga, Crown Point, and Moriah; Fulton (except the township of Stratford); Greene; Herkimer (except the townships of Webb, Ohio, and Salisbury); Madison; Montgomery; Oneida (except the townships of

Ava, Boonville, Forestport, and Florence); Onondaga; Orange; Oswego (except the townships of Redfield and Boylston); Otsego; Putnam; Rensselaer; Rockland; Saratoga (except the townships of Day, Edinburg, and Providence); Schenectady; Schoharie; Schuyler; that part of Steuben consisting of the townships of Addison, Corning, and Erwin; Sullivan; Tioga; Tompkins; Ulster; Warren (except the townships of Johnsburg, Thurman, and Stony Creek); Washington; and Yates (except the townships of Italy, Middlesex, and Potter); and in the State of New Jersey: Bergen; Essex; Hudson; Hunterdon; Middlesex; Monmouth; Morris; Ocean (except the boroughs of Barnegat Light, Beach Haven, Harvey Cedars, Ship Bottom, Surf City, Tuckerton, and the townships of Eagleswood, Lacey, Little Egg Harbor, Long Beach, Ocean, Stafford, and Union); Passaic; Somerset; Sussex; Union; and Warren.

* * * * * * * * * *

*Sec. 927.5 Dairy farmer.* "Dairy farmer" means any person who produces milk.

*Sec. 927.6 Producer.* "Producer" means any dairy farmer whose milk is delivered direct from farm to a pool plant: *Provided*, That a dairy farmer who, if not a producer pursuant to this order, would be defined as a producer under another order issued pursuant to the Act shall not be a producer under this order if the milk received from all such dairy farmers at the plant is assigned to Class III, or is subject to payments at the rates specified in Sec. 927.83 (b) (2), or is subject to payments at the rates specified in Sec. 327.83 (b)(1) and the milk is priced at the lowest class price under the other order.

*Sec. 927.7 Handler.* "Handler" means (a) any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area, (b) any person who engages in the handling of milk, concentrated fluid milk, cultured or flavored milk

drinks, cream, half and half, or skim milk, all or a portion of which is shipped to, or received in, the marketing area, or (c) any cooperative association of dairy farmers with respect to any milk which it causes to be delivered from dairy farmers to a pool plant of any other handler for the account of such association and for which such association receives payment.

• • • • • • • • • • •

*Sec. 927.29 Temporary pool plants.* Except for plants which, pursuant to paragraph (a) of Sec. 927.27 or pursuant to the proviso of paragraph (c) or to paragraph (e) of this section, are not eligible for designation, any plant not designated pursuant to Sec. 927.25 or Sec. 927.28 shall automatically be designated a pool plant in accordance with provisions of paragraphs (a) through (d) of this section: *Provided*, That no plant shall be a pool plant pursuant to this section (1) in any month in which it is a pool plant pursuant to provisions of Federal Order No. 119, or (2) in any of the months of December through June if it was a pool plant pursuant to provisions of Federal Order No. 119 in each of the preceding months of July through November.

*(a)* For any of the months of January through March and July through December, any plant at which 25 percent or more of the receipts of milk from dairy farmers is classified in Class I-A on some basis other than the failure to account for such milk shall automatically be designated a pool plant for such month.

*(b)* For any of the months of April, May, or June, any plant at which during the preceding period of October, November, and December either (1) no milk was received from dairy farmers, or (2) 60 percent or more of the milk received from dairy farmers was classified in Class I-A on some basis other than the failure to account for such milk, shall automatically be designated a pool plant for any of such months of April, May, or June in which 10 percent or more of the milk received from dairy farmers is classified

in Class I-A on some basis other than the failure to account for such milk.

*(c)* Any plant which is a pool plant in any of the months of April, May, or June on the basis of paragraph (b) of this section shall be a pool plant in any of the months of July through March following in which 60 percent or more of the milk received at the plant from dairy farmers is classified in Class I-A and Class I-B: *Provided*, That upon written request presented to the market administrator by the handler, the plant shall not be a pool plant on any basis from the month following receipt of such request until the following July 1.

*(d)* Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B: *Provided*, That such plant shall not be a pool plant if the handler operating the plant elects at the time of filing the report pursuant to Sec. 927.50 not to have the plant designated a pool plant, and to make payments into the producer settlement fund at the rate specified in Sec. 927.83 (b) for any nonpool milk or skim milk which, on the basis of products distributed in the marketing area to purchasers other than other plants is classified as Class I-A, Class II, or as skim milk subject to the fluid skim differential: *Provided further*, That such plant shall not be a pool plant, if in the absence of this provision, milk received from farmers at the plant would be classified and priced under another order issued pursuant to the Act, with a provision for market-wide equalization, and if the percentage of the milk received from dairy farmers at the plant which is classified as Class I-B and disposed of in the marketing area defined in such other order is greater than the percentage of such milk classified as Class I-A.

[NOTE: As in effect for the period prior to September 1, 1958 paragraph (d) reads as follows:]

*(d)* Any plant which for any month is not a pool plant because of failure to meet the requirements of paragraphs (a), (b), or (c) of this section (except a plant which is not a pool plant pursuant to the proviso in paragraph (c)), but from which Class I-A milk is distributed in the marketing area other than to another plant shall be a pool plant in any month at the option of the handler, exercised at the time of filing the report pursuant to Sec. 927.50, if at least 55 percent of the milk received from dairy farmers at the plant during such month is classified in Class I-A and Class I-B: *Provided*, That a plant at which, except for this paragraph, milk received from farmers would be classified and priced under another order issued pursuant to the Act, shall not be a pool plant pursuant to this paragraph unless the percentage of the milk received from dairy farmers at the plant which is classified in Class I-A is greater than the percentage of such milk which is classified in Class I-B and disposed of in the marketing area defined in such other order.

* * * * * * * * * *

*Sec. 927.83 Payments on milk received from dairy farmers at nonpool plants.* Payments shall be made by handlers to producers through the producer settlement fund, for milk and milk products under conditions, in amounts, and by the handler pursuant to paragraphs (a) through (d) of this section: *Provided*, That for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payments set forth in this section shall not be required.

*(a)* Payments shall be made for milk, concentrated fluid milk, fluid milk products, cultured or flavored milk drinks, cream, half and half, fluid cream products, and skim milk,

which milk or milk products meet each of the following conditions:

*(1)* It was derived from milk received at a nonpool plant from dairy farmers, from dairy farmers defined as producers pursuant to the provisions of Federal Order No. 119, or received from a handler designated as a producer-handler pursuant to Sec. 927.15.

*(2)* It was shipped to, received in, or distributed in the marketing area, or was received at a pool plant outside the marketing area.

*(3)* The milk or milk equivalent of the butterfat is classified as Class I-A or Class II, or the skim milk would be subject to the fluid skim differential if it were derived from pool milk.

*(b)* The amounts of payment for the products set forth in paragraph (a) of this section shall be as follows:

*(1)* If the milk or the milk equivalent of the butterfat, or the skim milk is classified and paid for under another order issued pursuant to the Act, the amount of payment on such products, except skim milk shall be any plus amount obtained by subtracting the value of the milk or the milk equivalent of the butterfat at the class price or prices under such order from the value computed in accordance with the classification and pricing set forth in this subpart: *Provided*, That the payment shall be at the rates set forth in subparagraph (2) of this paragraph if the other order permits the deduction of such payment from the amount otherwise due for such milk pursuant to such other order: *Provided further*, That no payment shall be applicable to milk distributed on routes in the marketing area defined in this order from a plant which is a pool plant under provisions of Federal Order No. 119. The amount of payments on skim milk shall be an amount computed pursuant to Sec. 927.44 adjusted for the location of the plant, except that no

payment shall be applicable to packaged skim milk classified and priced under provisions of Federal Order No. 119.

*(2)* If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant in the 401-425 mile zone, or in some other zone nearer the marketing area, the handling of which is not regulated by an order issued pursuant to the Act or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payment, except as otherwise specified in subparagraph (4) of this paragraph, shall be the differences between its classified value at the Class I-A or the Class II price, depending upon its classification, and its value at the Class III price, such class prices to be adjusted for butterfat test and the location of the plant at which the nonpool milk was originally received from farmers: *Provided*, That for concentrated fluid milk, cream, half and half, fluid cream products, and cultured or flavored milk drinks containing less than 3.0 percent or more than 5.0 percent butterfat, the payment shall be computed on the milk equivalent thereof as so classified. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 as similarly adjusted for location.

*(3)* If the milk or milk product is derived from milk received from dairy farmers at a nonpool plant farther from the marketing area than the 401-425 mile zone, the handling of which is not regulated by another order issued pursuant to the Act, or is regulated by another order as specified in the proviso of subparagraph (1) of this paragraph, the amount of payments shall be the difference between the value of its milk equivalent at the Class I-A or Class II price, depending upon its classification, and the value of such milk at the midwestern condensery price announced pursuant to Sec. 927.46 (b)(9), such class prices to be adjusted for the location of the plant at which the nonpool milk was originally received from dairy farmers: *Pro-*

*vided*, That for milk, fluid milk products, and cultured or flavored milk drinks containing 3.0 percent or more but not more than 5.0 percent of butterfat, the payment shall be the difference between the value of such milk or milk product at the Class I-A price for milk containing 3.5 percent butterfat, adjusted for location of the plant, and the condensery price. The amount of the payment on skim milk (either as skim milk, half and half, or in cultured milk drinks) shall be the amount computed pursuant to Sec. 927.44 similarly adjusted for location.

*(4)* For any month in which the volume of milk subject to the butter-cheese adjustment used in the computation of the uniform price is more than 15 percent of the combined volume of the Class I-A and Class II milk used in such computation, the payment required by subparagraph (2) of this paragraph shall be increased by the value of the milk or milk equivalent at the rate of the butter-cheese adjustment at the plant where the milk was received from dairy farmers.

*(5)* In computing the milk equivalent value of milk or milk products as specified in this paragraph, such value shall be computed on the basis of milk containing 3.5 percent of butterfat.

*(c)* Payment for any milk or milk product pursuant to this section shall be made, on behalf of the handler receiving the milk from dairy farmers, by the appropriate handler as set forth in subparagraphs (1) through (3) of this paragraph: *Provided*, That if the milk is received from a handler under another order issued pursuant to the act, which order provides that the payment to the producer settlement fund may be deducted from the handler's obligation under the other order, the payment shall be made by the handler subject to the other order regardless of the provisions of subparagraphs (1) through (3) of this paragraph:

*(1)* By the handler first receiving the milk or milk product at a pool plant outside the marketing area.

*(2)* By the handler operating the plant where the milk or milk product is first received in the marketing area if the milk or milk product is not received at a pool plant outside the marketing area.

*(3)* By the handler operating the plant from which the milk or milk product was moved into the marketing area if such milk or milk product is neither received at a pool plant outside the marketing area nor at a plant in the marketing area.

*(d)* The amount due pursuant to this section shall be entered on the handler's account as a debit immediately after the filing of the report pursuant to Sec. 927.50, or if the handler fails to file such report, such amount shall be entered on the handler's account in accordance with Sec. 927.80.

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## SUPPLEMENT B

### Notices of the State of New York With Respect to Hearings For Extension of Its Order to Northern New Jersey and Upper New York State

STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF MILK CONTROL

NOTICE OF HEARING WITH RESPECT TO PROPOSED AMENDMENTS TO REVISED OFFICIAL ORDER NO. 126 REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MILK MARKETING AREA

The Commissioner of Agriculture and Markets of the State of New York promulgated, effective September 1, 1938, Official Order No. 126 regulating the handling of milk in the New York Metropolitan Milk Marketing Area. Such order was promulgated jointly and concurrently with the promulgation by the Secretary of Agriculture of the United States of the latter's Order No. 27 regulating the handling of milk for the aforesaid marketing area. Since their pro-

mulgation, such joint and concurrent orders have been jointly revised and amended from time to time by the aforesaid officials. The terms and conditions of the State and Federal orders referred to above have at all times been similar and such orders have been jointly administered.

The United States Department of Agriculture has given notice of a hearing at which consideration will be given to proposed amendments to the Order (No. 27) of the Secretary of Agriculture of the United States regulating the handling of milk in the New York Metropolitan Milk Marketing Area, and on a proposed order regulating the handling of milk in the Northern New Jersey milk marketing area. The undersigned Commissioner of Agriculture and Markets has reason to believe that the policy declared in Section 258-k of the Agriculture and Markets Law will be effectuated by joining with the United States Department of Agriculture in holding such hearing for the sole purpose of amending Official Order No. 126 regulating the handling of milk in the New York Metropolitan Milk Marketing Area.

Notice is hereby given, therefore, pursuant to the provisions of Section 258-n and to other relevant provisions of the Agriculture and Markets Law as amended, of a hearing to be held jointly and concurrently with the United States Department of Agricuture at the Hotel Robert Treat, Newark, New Jersey, beginning on June 18, 1956 at 10:00 a.m., e.d.t., and also at the following times and places beginning in each instance at 10:00 a.m., e.d.t.: July 10, Alfred E. Smith State Office Building, Albany, New York; July 12, Nelson House, Poughkeepsie, New York; July 17, Arlington Hotel, Binghamton, New York; July 19, Mark Twain Hotel, Elmira, New York; July 24, Utica Hotel, Utica, New York; July 26, Syracuse Hotel, Syracuse, New York, for the purpose of receiving evidence with respect to proposed amendments to Official Order No. 126 regulating the handling of milk in the New York Metropolitan Milk Marketing Area.

Evidence will be received at this hearing with respect to proposed amendments set forth in the notice of hearing of the United States Department of Agriculture signed by Roy W. Lennartson, Deputy Administrator, Agricultural Marketing Service on May 18, 1956 and in the supplemental notice signed by Roy W. Lennartson on May 29, 1956, which proposed amendments are hereby incorporated herein by reference.

Copies of this notice and of the notices of the United States Department of Agriculture may be obtained from the Division of Milk Control, Department of Agriculture and Markets, State Office Building, Albany, N. Y., and from the Market Administrator, 205 East 42nd Street, New York 17, N. Y.

DANIEL J. CAREY, Commissioner
of Agriculture and Markets of
the State of New York

By KENNETH F. FEE
Kenneth F. Fee, Director
Division of Milk Control

Dated at Albany, N. Y.
June 1, 1956

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STATE OF NEW YORK
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF MILK CONTROL

AMENDED NOTICE OF HEARING WITH RESPECT TO PROPOSED AMENDMENTS TO REVISED OFFICIAL ORDER NO. 126 REGULATING THE HANDLING OF MILK IN THE NEW YORK METROPOLITAN MILK MARKETING AREA

On June 1, 1956 the undersigned Commissioner of Agriculture and Markets gave notice of a hearing to be held jointly and concurrently with the United States Department of Agriculture, to begin on June 18, 1956, for the purpose of receiving evidence concerning proposed amend-

ments to Official Order No. 126, regulating the marketing of milk in the New York Metropolitan Milk Marketing Area, such Official Order No. 126 and Order No. 27 of the Secretary of the United States Department of Agriculture being joint and concurrent orders regulating the marketing of milk in such milk marketing area.

On February 26, 1957 the United States Department of Agriculture amended the notices heretofore issued by it concerning the joint and concurrent hearing which began on June 18, 1956 by issuing a supplemental notice to include consideration of whether, on the basis of the entire record of the hearing in such proceeding, a single marketing agreement and order, regulating the handling of milk for a marketing area consisting of all the territory in the States of New York and New Jersey for which regulation was proposed in the original notices, should be issued and would better effectuate the purposes of the Agricultural Marketing Agreement Act of 1937 as amended than would two or more separate marketing agreements or orders for such territory.

The amended notice of the United States Department of Agriculture states that evidence also will be received (1) with respect to specific terms and provisions of such a single marketing agreement and order and (2) as to whether such single marketing agreement and order if issued should be issued in the form of a new marketing agreement and order or by amending Order No. 27.

Notice is hereby given, therefore, pursuant to the provisions of Section 258-n and to other relevant provisions of the Agriculture and Markets Law as amended, that at the hearing which commenced on June 18, 1956 evidence will be received on the additional proposals set forth in the amended notice of hearing of the United States Department of Agriculture dated February 26, 1957, which additional proposals are hereby incorporated herein by reference.

Copies of this amended notice and of the amended notice of the United States Department of Agriculture may be obtained from the Division of Milk Control, Department of Agriculture and Markets, State Office Building, Albany, N. Y., and from the Market Administrator, 205 East 42nd Street, New York 17, N. Y.

DANIEL J. CAREY, Commissioner
of Agriculture and Markets of
the State of New York

By KENNETH F. FEE
Kenneth F. Fee, Director
Division of Milk Control

Dated at Albany, N. Y.
February 28, 1957

Office Supreme Court, U.S.
FILED
NOV 24 1961
JOHN F. DAVIS, CLERK

IN THE

# Supreme Court of the United States

**OCTOBER TERM, 1961**

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## No. 79

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LEHIGH VALLEY COOPERATIVE FARMERS, INC., et al.,

*Petitioners*

v.

UNITED STATES OF AMERICA, et al.,

*Respondents.*

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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**OPPOSITION TO MOTION OF DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, et al., TO FILE BRIEF AMICI CURIAE**

---

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IN THE

# Supreme Court of the United States

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## OPPOSITION TO MOTION OF DAIRYMEN'S LEAGUE COOPERATIVE ASSOCIATION, et al., TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 42(3) Lehigh Valley Cooperative Farmers, Inc., et al., Petitioners, by their attorneys object to the Motion to file Brief Amici Curiae for the following reasons:

1. The Brief of the Applicants was offered for filing prior to Order of Court and without written consent of all parties, in flagrant disregard of Rule 42(2).

2. The filing of Applicants' Brief is tardy in that it has not and cannot now be presented with the copy of the required Order of Court within the time allowed for the filing of the Brief of the party supported, November 13, 1961.

3. The filing of Applicants' Motion was tardy in that it is implicit in Rule 42(3) that such a Motion be filed in time to permit the Court to act on the Motion and Opposition thereto within the time allowed for the filing of the Brief of the party supported.

4. The filing of Applicants' Motion was tardy in that no reason is suggested for the inordinate delay in said filing even though counsel for Petitioners refused consent early in September 1961, which refusal was confirmed in writing by letter of September 8, 1961, which delay is in violation of the timely requirement of Rule 42(3).

5. The time for filing Respondents' Brief was originally October 5, 1961. At the request of the Solicitor General, counsel for Petitioners agreed to extensions to November 6, 1961, and then to November 13, 1961. The Briefs of Respondents and the States of New York, New Jersey, Connecticut and Vermont were filed prior to November 13, 1961. Petitioners have addressed themselves to preparing a Reply Brief to those filed on or before the above date. Petitioners claim for relief was instituted August 1, 1957, and since that time they have been required to pay substantial sums of money into the registry of the Court monthly. The Petitioners have not asked for delay during the various stages of this litigation, which has extended over a period of more than four years. The status of the Applicants' Brief is uncertain, and Petitioners had no knowledge until November 14, 1961, that the Applicants were actually going to ask for permission to file a Brief Amici Curiae. The lateness that would be occasioned by the granting of this Motion is prejudicial to Petitioners. The Petitioners have never asked for an extension of time during the steps of this litigation, and have only reluctantly agreed to extensions asked for

by the Respondents, because of the heavy financial burden imposed. Petitioners oppose any further extension of time to any interested parties.

6. The Motion fails to "concisely state the nature of the Applicants' interest" with respect to nine (9) of the fourteen (14) Applicants, in that their interest is shown only vaguely, by the meaningless statement that "the vast majority are under Federal Milk Marketing Orders containing compensatory payment provisions comparable to those in issue". (Motion p. 4m)

7. Applicants' Motion fails to allege relevant facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the United States Solicitor General, and the Briefs of the States of New York, New Jersey, Connecticut and Vermont heretofore filed.

8. Applicants' Motion alleges numerous factual matters concerning their memberships, their locations, and their relationships to other marketing orders which Petitioners have no opportunity to verify because of the time element involved in the peculiar filing of Applicants' Motion.

## Conclusion

For the foregoing reasons the Motion of Dairymen's League Cooperative Association, Inc., et al., for leave to file Brief Amici Curiae should be denied.

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November 20, 1961

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## REPLY BRIEF FOR PETITIONERS

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## REPLY BRIEF FOR PETITIONERS

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Certain errors of interpretation and omissions in Respondents' Brief in this case require reply by Petitioners. A careful attempt will be made to avoid restatement or elaboration of any arguments presented by Petitioners in their main brief.

### (1) The 1953 Hearing Record is not Properly Before the Court.

The Respondents make reference to the record of an administrative hearing held in 1953 in which "the entire

subject of compensatory payments was extensively considered . . . " (Resp. Brief P. 23) That record, it is argued, along with the record developed at the 1957 hearing "clearly establish the need for partial regulation of non-pool handlers who sell in the marketing area". Furthermore, the claim is made that the records of those hearings justify the "particular form of regulation which the Secretary has selected". Although reference is made to Petitioners' objection to the introduction of the 1953 hearing record into the administrative hearing in the present case, they neglect to state that the objection was sustained by the Hearing Officer. The compensatory payment provisions here under attack are based on the record of the 1957 hearings, when Northern New Jersey was included in the Order No. 27 Marketing Area for the first time. The 1953 proceedings and the record incident thereto were neither offered nor made a part of the 1957 Promulgation hearing record, and are not in the record now before the Court. Respondents have no basis upon which to assert that the 1953 hearing record contains matters relevant to the present controversy, nor that it justifies the particular form of compensatory payment which the Secretary has imposed upon Petitioners.

In 1953, Petitioners, since they sold no Class I milk in the Marketing Area, were not affected by any of the provisions of Order No. 27, and would have had no standing to appear at those hearings either in support or opposition to any of its provisions. Certainly Petitioners could not have made any attack in this or any other proceeding against the legality of the compensatory payment provisions of Order No. 27 prior to August 1, 1957, since they were in no way aggrieved by them. The 1953 hearing record, having neither been offered nor introduced into the 1957 hearing, and Petitioners having no right to attack the compensatory payment provisions of Order No. 27 prior to 1957, Petitioners objected to its introduction into the administrative hearing by which this litigation was begun. The Hearing Officer properly sustained Petitioners'

objections and the 1953 hearing record, whatever it may contain pertaining to the compensatory payment provisions of Order No. 27 at that time, is not a part of the record which must now be considered by this Court. Its contents are unknown in this case, and Respondents' reliance upon it is unwarranted and improper.

**(2) The 15% Limitation Does Not Validate the Contested Provisions.**

Respondents refer to that portion of Section 927.83 of Order No. 27 (R. 879a) which provides that no compensatory payments are required "for any month in which the volume of Class III milk used in the computation of the uniform price is less than 15% of the combined volume of the Class I-A and Class II milk used in such computation. . . ". They conclude from this that the Secretary imposes compensatory payments upon non-pool handlers "only when there is a displacement of pool milk by non-pool milk". In fact, since August 1, 1957, the date upon which Northern New Jersey was included in the Order No. 27 Marketing Area, there has never been a month during which the volume of Class III milk in the market was less than 15% of the combined volume of the Class I-A and Class II milk. On the contrary, the Class III volume in the months of least production has been approximately double that amount since 1952 and the most recent figure for September, 1961, shows the Class III volume at 41.25% of the total volume. Respondents' argument has no connection whatsoever with the realities of the level of milk supply in the market. Respondents' position actually is that any sale of Class I milk in the marketing area by a non-pool handler is a displacement of pool milk by non-pool milk and should, therefore, be prohibited. They are willing to press this position, even though Petitioners would be deprived of Class I sales made by them in this market for more than 20 years. The 15% provision by no

means changes the nature of the compensatory payment demanded from penalty to compensation. Its introduction into Order 27 was nothing more than a spurious attempt to comply with the holding in the *Kass* case in a manner designed to be ineffectual, inoperative and meaningless.

Respondents refer to the Secretary's "careful consideration" of the various proposals pertaining to peripheral milk and his selection of the present provision as "the *only* fair and feasible solution". (Resp. Brief P. 26-30) The Secretary's Findings of Fact in support of the compensatory payment provisions here involved neither state nor imply that the provision adopted was the *only* fair and feasible solution. His Findings on this point are nothing more than an attempt to justify the total exclusion of all non-pool milk from the large New York-New Jersey Class I milk market.

**(3) Size of the Market and the Intermingling of Regulated and Unregulated Producers and Handlers Do Not Validate the Contested Provisions.**

Respondents cite the principal that compensatory payment provisions may vary with local economic circumstances, and in less "complex" milk sheds where pool and non-pool handlers are geographically separated and not in competition for farmers, a compensatory payment differing from the one here at issue might be justified. The contention that the type of compensatory payment is related to the size and intermingling of producers in a given milk marketing area, lacks force when it is realized that the Secretary has used at least five different compensatory payment provisions in various orders throughout the country without regard to these factors.

In approximately twenty-five Orders, there is no provision for compensatory payments whatsoever. This group includes *Chicago* and *Philadelphia*, both of which markets

are large, similar to the market here involved, and served by competing farmers and competing regulated and unregulated handlers. In another category there are at least eleven orders which contain provisions for a compensatory payment measured by the difference between the Class I or fluid price and the uniform market price. The *St. Louis* milk marketing area is included within this group. It must be conceded that the St. Louis market is also large and one in which there is close geographical proximity between regulated and unregulated milk handlers and their producers. In still another group, the non-pool handler has an option to pay the difference between the Class I and manufactured price on Class I sales in the area to the marketwide Equalization Fund, or the plus difference between the value of the milk received at his plant computed as if such plant were regulated under the Order and the gross payments actually made by the handler. There, if the gross payments are equal to or higher than the value computed under the Order price, the handler is not required to make any payments. Typical of this group is the Southern Michigan Order, which encompasses the area of *Detroit,* also a large and intermingled market.

The size of the New York-New Jersey Milk Marketing Area and the intermingling of regulated and unregulated handlers in it neither supply legal justification for the type of compensatory payment incorporated in Order No. 27 nor demand it. The law requires that any compensatory payment device must conform to the standard of uniform treatment of all handlers who supply the market with Class I milk. Anything short of this produces the discrimination proscribed by the statute. Without exception it is agreed that milk is available to non-pool handlers, such as Petitioners, only at prices in excess of the Order No. 27 blend or average market price. Addition of the compensatory payment demanded of Petitioners thus produces the non-uniformity in the treatment of pool and non-pool handlers, both of whom supply the same market with Class I

milk, which renders the provision invalid and repugnant to Section 8c(5) of the Act, regardless of the size of the market.

**(4) The Secretary's Findings were Challenged by Respondents from the Outset of this Litigation.**

Respondents assert that Petitioners failed to challenge the Secretary's Findings and conclusion that the contested compensatory payment provisions are authorized by Section 8c(7)(D) of the Act. An examination of the Petitioners' pleadings, both in the administrative proceeding under Section 8c(15)(A) and the Petition of Appeal under Section 8c(15)(B), demonstrates the error of this contention. In the administrative petition, Petitioners objected to the Secretary's Finding that handlers and producers under Order No. 27 carry the surplus for the Class I sales in the market made by Petitioners and those similarly situated. It was also pointed out that the Secretary erred in failing to recognize that Petitioners paid prices far in excess of those paid producers by pool handlers and that the challenged provision not only discriminates against Petitioners and other non-pool handlers but is unnecessary to protect the status of the pool. In the subsequent Bill of Complaint, filed under Section 8c(15)(B), to review the Secretary's decision on the administrative proceeding, Petitioners reiterated these allegations of error, so that from the outset the Findings of the Secretary were challenged at every point by Petitioners. There is no basis for the assertion that Petitioners can be assumed to have acquiesced in any of the Secretary's Findings by virtue of a failure to contest or deny them.

**(5) The Provisions are Neither Incidental nor Necessary to Effectuate the Purposes of Sections 8c(5)(A), (B) and (C).**

The argument is made by Respondents that the provisions in question are both incidental and necessary to

effectuate the pool system authorized by Sections 8c(5)(A), (B) and (C), and that being auxiliary to these provisions, are authorized by Section 8c(7)(D). Petitioners have pointed out in their main brief that the compensatory payment provisions of the Order are inconsistent with Sections 8c(5)(A) and (B) and are invalid for that reason alone. However, the record of the 1957 promulgation hearing demonstrates that the provisions are not only inconsistent with 608c(5)(A) and (B), but are in fact neither incidental nor necessary to effectuate the pricing system established by those sections. In view of the uncontested fact that milk is not available to Petitioners at the Class III price established in Order No. 27, a provision which imposes a compensatory payment of the difference between the Class I and Class III prices in the Order is, contrary to the statute, "unnecessary" and "not incidental" to the clear purpose of maintaining uniformity of regulation of all handlers and producers who supply the New York-New Jersey Milk Marketing Area.

**(6) The Unconstitutionality of the Secretary's and the Circuit Court's Interpretation of Sections 8c(7)(D) is properly raised.**

Respondents object to Petitioners' argument that if the contested provisions are construed to be authorized solely by Section 8c(7)(D), such construction would result in an unconstitutional delegation of legislative power to the Secretary, since the power would then not be accompanied by the necessary standards to guide the Secretary in the use of it. The objection is that Petitioners' argument was not made below and is, therefore, not properly before the Court. This is a misconception of Petitioners' contention. No attack is made upon the constitutionality of Section 8c(7)(D). The attack is made only upon the interpretation placed upon it by the Secretary and the Court below. At the inception of this litigation, Petitioners alleged in

their administrative petition that the Secretary's issuance of the amendments in question was unconstitutional, illegal and in violation of the Marketing Agreement Act of 1937, as amended. (R. 13a, 21a, 30a, 37a-38a). Again, in the Bill of Complaint, filed by Petitioners in the review proceeding under Section 8c(15)(B) of the Act, the action of the Secretary was alleged to be in violation of the Constitution of the United States. (R. 148a, 160a). Finally, even if the constitutionality of the interpretation of Section 8c(7)(D) by the Secretary and the Court below had not been raised heretofore, that issue could properly be brought before the Court at this stage of these proceedings. Respondents' argument that the constitutional question is not properly raised is without substance.

**(7) The Challenged Provisions are not Essential to a System of Regional Regulation.**

Great weight is attached by Respondents to the argument that Petitioners' position is in conflict with the statutory mandate that the regulatory system under the Act be established on a regional basis. It is contended that regionality would thereby be destroyed and every handler and producer in the United States would become fully regulated under a single nationwide milk order. This is neither the intended result nor the logical conclusion derived from Petitioners' position. Congress intended that the regulation of milk prices should be achieved on a regional basis and that the Order for each region should reflect the conditions pertaining to that area. All handlers who dispose of Class I milk in a given area, and the producers who supply that milk, were to be required to comply with uniform rules and regulations, so that insofar as the sales within a given area were concerned, there should be no discrimination among the handlers and producers who supply and market the Class I milk involved. The Secretary was authorized to issue different sets of rules and regulations in the various

regional marketing areas. Once issued, however, he was directed to make them applicable in a uniform manner to those who produce and market the milk. (Pet. Brief, P. 26)

This theory of regionality is consistent with the historical and traditional manner in which milk is marketed. For example, since 1934, regulation of milk prices in Pennsylvania, under the Pennsylvania Milk Control Law, has functioned in this same manner. Within the state, there are thirteen milk marketing areas, for which specific minimum milk prices are established. For any milk sold by any milk dealer in Pennsylvania in any of the areas, his obligation to producers is fixed by the minimum producer and resale prices prescribed in the Order applicable to the area in which the milk is sold.

Petitioners' position in this case is thoroughly consistent with the Congressional direction that price regulation under the Agricultural Marketing Agreement Act be carried out on a regional basis. The provisions of Order No. 27 can and must be made uniformly applicable to all sales of Class I milk in the area in which it is sold.

**(8) The Contested Provisions are not Authorized under the Doctrine that they Constitute "Customary Differentials" under Section 8c(5)(A)(1) of the Act.**

Respondents point out that in the case of *Green Valley Creamery v. United States*, 108 F. 2d 342, two sets of minimum prices were authorized in the Order applicable to the Greater Boston Marketing Area: one where purchases of milk were made from an association of producers and the other for purchases from producers who were not members of the Association. The Court in that case affirmed the Order of the Secretary under the terms of Section 8c(5)(A)(1) which authorized establishment of uniform prices to all producers for milk delivered to all handlers, subject only to adjustments for "(1) volume, market, and production differentials *customarily applied by the hand-*

*lers* subject to such order. . ." (Emphasis supplied) The Court found that the differentials there in question were those which had been customarily applied and were thus specifically authorized by the language of the statute. At page 345 of the decision, the Court held:

> ". . . In promulgating the Order the Secretary of Agriculture found as a fact, upon evidence introduced at the administrative hearings, 'that the differential in prices to associations of producers, and producers, is justified as a reasonable allowance for services actually performed by associations of producers'. It is not denied that there was evidence before the Secretary warranting a finding that such a differential *had customarily been applied in the market area*, for the reason that milk purchased from associations of producers has an enhanced value due to the fact that many marketing services have already been performed by such associations. In view of these facts, we think that the Government is right in its contention that this differential in prices applicable to milk received from producers and milk received from associations of producers is authorized by Section 8c(5)(A)(1) of the Act as a market differential customarily applied by handlers. . . ." (Emphasis supplied)

The doctrine of the *Green Valley Creamery* case, supra, has no application to the present issues. There is no allegation, nor could there be, that the compensatory payment provisions of Order No. 27 represent a "customary differential", in existence in the market prior to the enactment of the Agricultural Marketing Agreement Act and the promulgation of Order No. 27.

**(9) Non-Pool Plants Neither Represent a Proper Classification nor Are They Accorded Uniform Treatment Under the Contested Provisions.**

It is contended by Respondents that the Secretary has authority to impose upon non-pool plants pricing require-

ments which differ from those pertaining to pool plants on the theory that the uniformity requirement of the statute refers "to all handlers who occupy the same position" and that non-pool plants represent a "proper classification". It is contended, further, that all non-pool handlers are treated alike and that whatever uniformity is required under Section 8c(5)(A) has thus been accorded.

Petitioners do not concede that the Secretary has authority to impose non-uniformity upon any handlers by classification, and certainly the classification of "non-pool" handlers is too sweeping to be reasonable. Non-pool handlers fall into three principal categories: (a) handlers regulated by some other Federal Order; (b) handlers regulated by a State agency which fixes prices to be paid producers for milk sold within the State and without the State; (c) handlers regulated by neither Federal nor State Orders. The impact of the compensatory payment provisions involved in this case is different as it applies to the three groups. No compensatory payments are required of some of these handlers; minimal payments may be required of others; and the maximum compensatory payment that can be levied by reason of the compensatory payment provision has been imposed upon the Petitioners. The Petitioners are subject to the rules and regulations of the Pennsylvania Milk Control Commission, and in the case of Lehigh Valley, to Federal Order No. 61 as well. As has been pointed out in Petitioners' brief in chief and elsewhere in this brief, the Pennsylvania Milk Control Commission establishes Class I prices substantially higher than those under Federal Order No. 27 or any other Federal Orders in the proximity of Federal Order No. 27. It is thus apparent that there is an absolute lack of uniformity in the application of the compensatory payment provisions of Order No. 27 to non-pool plants and that the Secretary has made no attempt at the establishment of uniformity on the basis of classification, proper or improper.

**(10) The Provisions in Issue Are Not Required on the Basis of Administrative Feasibility.**

It is contended that the present compensatory payment provision is the only method available to the Secretary, since determination of the actual costs of milk to a non-pool handler would be impossible. The record in this case shows that the Market Administrator has the authority and does in fact demand of Petitioners full disclosure of all the facts pertaining to the handling of their milk and can determine the prices paid therefor as well as its disposition. These reports are filed monthly and are subject to full audit and verification by the Market Administrator's staff. There is no greater burden imposed upon the Market Administrator in securing information concerning the handling of milk by non-pool plants than there is in the case of pool plants. The Administrator has been able to secure this information regularly and accurately from August 1, 1957, the effective date of the extension of Order No. 27. Furthermore, administrative feasibility is not a factor which the Courts may take into consideration to alter or amend a statute where the intention of Congress is clearly expressed. Even if that were possible, no such question is here involved.

**(11) The Invalidity of the Contested Provisions under Section 8c(5)(G) is Clear and Was Raised by Petitioners in the First Stage of this Litigation.**

Petitioners contend that the compensatory payment provisions in issue violate Section 8c(5)(G) of the Act, since they prohibit the marketing of Petitioners' milk in the New York-New Jersey Milk Marketing Area. Respondents argue that this contention was not raised in the administrative proceeding under Section 8c(15)(A) by Petitioners and that, therefore, it is not properly before the Court. In fact, Petitioners alleged in the administrative petition that the Secretary's action establishes internal tariffs or

barriers interfering with the free flow of milk, in violation of the specific provisions of the Agricultural Marketing Agreement Act and the Constitution of the United States. (R.-19a, 35a, 144a, 147a, 155a, 158a) Respondents claim Petitioners do not contend that the compensatory payment provisions completely preclude the entry of all such milk. This is a total misconception of the Petitioners' position on this point. In their brief, at page 48, the Petitioners' position is stated as clearly as possible where the following language appears:

> "In the present case the disparity in prices is many times more aggravated than in the *Kass* case, and prohibits the entry of milk into the marketing area in direct violation of 8c(5)(G) of the Act."

Petitioners not only contend that the provisions under attack prohibit the flow of milk into the area, but actually drive handlers with long-established sales and distribution out of the marketing area.

The Secretary has created a situation where New York-New Jersey pool handlers have a monopoly over all Class I sales in this vast metropolitan area by exclusion of all non-pool handlers. On the other hand, non-pool handlers have no such preferred status against the invasion of pool handlers in the markets where they sell most of their Class I milk. Order No. 27 pool handlers whose minimum class prices under Order No. 27 are less than those imposed upon Petitioners by the Pennsylvania Milk Control Commission are able to market Class I milk in the Allentown-Easton-Bethlehem area at a competitive advantage over Petitioners. Thus, we have a group of pool handlers who demand exclusive rights to sell milk in the New York-New Jersey Milk Marketing Area but would under no circumstances give up their rights to sell Class I milk at an advantage in competition with non-pool plants in their areas of principal distribution. The monopoly features of this controversy are glaringly apparent.

**(12) Petitioners are not Estopped from Contesting these Provisions by any Election Made by Them.**

Respondents contend that Petitioners' election of non-pool status precludes them from questioning the validity of the compensatory payment provisions of the Order. Petitioners' position on this issue has been stated in the main brief. The use of the election or option device was a clear maneuver on the part of the Secretary to preclude adjudication of Petitioners' fundamental legal rights in this litigation. Under all the circumstances, it is clear that the option offered Petitioners was an empty right.

In support of the position taken by Respondents, their brief cites five cases at page 57. In each of these cases, the Plaintiff was given an option to remain outside the regulatory provisions of the statute in question, or place himself under its jurisdiction voluntarily to gain its benefits. In each instance, Plaintiff elected to use the statute, and thereafter sought to question its validity, and in each instance, the Court decided against the Plaintiff. None of these cases has application to the present controversy. Petitioners were placed under the regulatory plan of Order No. 27 involuntarily and without their acquiescence. At the very most, they were subsequently afforded a choice as between two types of regulation. In the case of Lehigh, even this form of election was not available from August 1, 1957 to September 1, 1958, and it is not established in the record that Lehigh's percentage of Class I sales thereafter was high enough to afford it pool plant status even if it had so elected.

Respondents imply that Lehigh voluntarily changed its method of operation on July 1, 1957 for the specific purpose of becoming ineligible for pool plant status under Order No. 27. The record negates this contention. (R. p. 324a) In fact, Lehigh, by July 1, 1957, completed a long standing plan to secure certain local health certificates for its pro-

ducers so that milk might be shipped directly from its plant for ultimate distribution in the entire Philadelphia market. Such shipments began on July 1, 1957, and as a result Lehigh became a handler fully regulated under the Philadelphia Order. This precluded pool plant status under Order No. 27 from August 1, 1957 until September 1, 1958, the date upon which Order No. 27 was amended.

We do not have in this instance, as in the cases cited by Respondents, a situation where Petitioners have availed themselves of the benefits of a statute and now contest its validity. At no stage in the operation of Order No. 27 have Petitioners had a vountary choice which would have produced the estoppel contended for by Respondents.

**(13) Congressional Inaction Establishes the Doctrine of the Kass Case as the Correct Interpretation of the Intent of Congress Concerning the Contested Provisions.**

Respondents contend that Congressional inaction in the face of the widespread use of compensatory payment provisions in Milk Marketing Orders generally, supports their contention that the provisions here attacked are valid. Congressional inaction, in this regard, rather than lend weight to the Respondents' position, supports Petitioners' contentions. Congress stated clearly the purposes and objectives of the Agricultural Marketing Agreement Act, and the standards in accordance with which the Secretary was authorized to achieve them. By inaction, after a hearing before the Subcommittee on Dairy Products, of the Committee on Agriculture, House of Representatives, 84th Cong., 1st Session, Congress has acknowledged that the Opinion in the *Kass* case correctly interprets the Congressional intent regarding the uniformity standard. There is no need to amend the statute. Congress has already de-

clared that price-fixing under the statute must be uniform both as to handlers and producers.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1961

No. 79

LEHIGH VALLEY COOPERATIVE FARMERS, INC. AND SUNCREST FARMS, INC., *Petitioners*

v.

UNITED STATES OF AMERICA AND ORVILLE L. FREEMAN, Secretary of Agriculture, *Respondents*

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE, AND BRIEF FOR THE LAWSON MILK COMPANY

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## MOTION OF THE LAWSON MILK COMPANY FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 42 (3), the Lawson Milk Company, an Ohio corporation, moves this court for leave to file a brief amicus curiae urging reversal of the Third Circuit Court of Appeals decision and affirmance of the

District Court. The petitioners consent to the filing of such brief. Respondents refused such consent. The interest of the applicant and the reasons for this motion are as follows:

1. APPLICANT'S CASE. Applicant is plaintiff-appellant in an action now pending in the United States Court of Appeals for the Sixth Circuit titled *Lawson Milk Company* v. *Freeman*, No. 14,410, reported in the District Court as *Lawson Milk Company* v. *Benson*, 187 F. Supp. 66, and in the Department of Agriculture as *In re the Lawson Milk Company*, April 1958, 17 A.D. 239, 597.

Applicant's case (hereafter the *Lawson* case) challenges the legality of penalty payment provisions in the Cleveland Milk Order similar to those in the New York Milk Order challenged here (the *Lehigh* case).

The similarity of *Lawson* to *Lehigh* has been frequently noted in the latter in its course through the Department of Agriculture, *In re Lehigh Valley Cooperative Farmers, Inc.*, February 1959, 18 A.D. 75; *In re Sunset Farms, Inc.*, March 1959, 18 A.D. 191, and in the opinion of the Third Circuit, *U. S.* v. *Lehigh Valley Cooperative Farmers, Inc.*, 287 F. 2d 726. The similarity and comparison has also been noted in the opinion of the District Court in *Lawson*, *supra*, and in other opinions of the Department of Agriculture, *In re Chapman Dairy*, April 1959, 18 A.D. 323, *In re Grocer's Dairy Company*, 18 A.D. 995, *In re Knudsen Brothers Dairy, Inc.*, 18 A.D. 1333, (since reversed by the District Court in *Knudsen Bros.* v. *Benson*, now on appeal to the Second Circuit, No. 26698).

While the same basic question is presented in both cases—the domestic tariff walls in the national milk

market being erected through the penalty payment device—*Lawson* presents the question in a somewhat more typical aspects and less sophisticated context.

2. CURRENT STATUS OF APPLICANT'S CASE. When *Lehigh* was decided by the Third Circuit, applicant moved the Sixth Circuit, where its case was pending, for leave to petition for certiorari before judgment. The Government did not consent and the motion was denied by the court. However, being advised that a petition for certiorari would be filed in the *Lehigh* case, it accepted the suggestion of the Government and stayed further proceedings in *Lawson* pending the outcome of *Lehigh*. This order is still in effect.

3. DISCUSSION OF APPLICANT'S CASE HERE. Briefs filed herein by the petitioners, and by the State of Minnesota, amicus curiae supporting petitioners, do not make reference to the *Lawson* case. However, briefs of the Government make repeated references to *Lawson* as do briefs amicus filed in support of the Government by the States of Vermont, Connecticut, and New Jersey, and by the multitudinous interests of Dairymen's League Cooperative Association, Inc., et al. Only the amicus brief of the State of New York omits mention of it.

4. A MORE BALANCED PORTRAYAL NEEDED. While it would seem that the Court already has a host of friends advising it with respect to applicant's case, all of its advisors are on respondents' side of the question. Respondents and their many supporters are perhaps correct in thus attaching importance to applicant's case. The somewhat different aspect and context in which it presents the same basic question here involved does serve to illuminate that basic question. But the illu-

nination will be more balanced if the light comes from more than one direction.

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## BRIEF OF THE LAWSON MILK COMPANY AMICUS CURIAE

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### INTEREST OF LAWSON MILK COMPANY

The Lawson Milk Company is plaintiff-appellant in a similar case now pending before the Sixth Circuit, reported in the District Court as *Lawson Milk Company* v. *Benson*, 187 F. Supp. 66, and in the De-

partment of Agriculture as *In re the Lawson Milk Company*, 1958, 17 A.D. 239, 597.

## ARGUMENT

The similarities between the *Lawson* case and the present *Lehigh* case have been frequently noted in discussions of the latter. The similarities need not be belabored here. It is sufficient to say that both cases present the same basic question:

> Whether domestic tariff walls are being buttressed in the national milk market through the medium of penalty payment provisions in Federal Milk Orders. Those in the New York Milk Market are challenged here in the *Lehigh* case and those in the Cleveland Milk Order are being challenged by this amicus in the *Lawson* case.

Here this amicus will discuss the basic question in the light of the more typical aspect and less sophisticated context in which it is presented in the *Lawson* case. In doing so, this amicus will emphasize the differences between *Lehigh* and *Lawson*, and between both of them and *Kass* in the belief that the hard core idea of insularity which underlies all of these situations will best be perceived from the differing viewpoints provided by formal differences.

### Expulsion and Exclusion in Government of Urban Milk Markets

The essential point of difference between *Lehigh* and *Lawson* is that in *Lehigh* the penalty payment provisions operate affirmatively so as to *force out* of the protected market the retail milk dealer primarily associated with the neighboring market. In the *Lawson* case the penalty payment provisions operated nega-

tively, to *keep out* competition from neighboring retail milk distributors. It is suggested that *Lawson* is the more typical case and represents a more effective trade barrier because only the most determined maverick in the milk industry would ever seek to expand into such a market. In this connection, the teaching of the late Walton Hamilton of Yale in "The Politics of Industry," Knopf, 1957, should provide a healthy antidote to any sentimental ideas about the supposedly differing interests of parties regulated and the independence of the agencies regulating them. He uses the milk industry as a refuting example, at page 58:

> "Within the milkshed, inspection became more and more rigid, and more and more irrelevant to the public health. Fewer producers were able to measure up to the standards. In this way an artificial scarcity was created, and a situation emerged in which it was easy to fix prices. Meanwhile a system of collective bargaining between distributors and dairy farmers emerged. During the depression the Federal Government stepped into the picture. Market quotas were assigned to farmers; milk produced in excess of such quotas was sold as surplus. The quotas were in fact passports to a sheltered market. As a result, two quarts of milk identical in quality and from the same source sell at different prices. The one is destined to be sold as fluid milk in a closed local market, and the other as surplus in a competitive national market. Each milkshed has been fitted out with its system of private government.
>
> "Although milk and liquor lie far apart, their regulation presents similar, though different, patterns. . . . The justification for the array of controls is public morals. Yet not only is there tolerance of this vexatious and intricate system of governmental interference; but there is acceptance of it as the means to security and economic salva-

> tion. So firmly entrenched is the scheme of controls that, in fluid milk and liquor, the most radical and tormenting measure which might be taken would be to return the commodities to the free and open market."

Professor Hamilton might well have added a footnote to the power of these oligarchies in the monument to protectionism provided by penalty payment provisions. He would undoubtedly have noted with great interest the names and number of supporters of such protectionism shown by the amici briefs in this case. Nor is he alone in his analysis. Many other authorities are mustered by Anthony Lewis in his article "To Regulate the Regulators" in the February 22, 1959 edition of the New York Times Magazine.

**Two Sides to the Penalty Payment "Bargain"**

Another point of difference arises out of the fact that the penalty payments provisions in the New York Milk Order under attack in the *Lehigh* case were promulgated in 1957, long after the cruder and less sophisticated Cleveland Order provision, and only after the Cleveland Order provision had been in litigation before the Department of Agriculture for more than four years in the *Lawson* case. This undoubtedly accounts for the "Hobson's choice" provided in the New York Order between what the government is pleased to call "full regulation" and "partial regulation." Just as Hobson gave his customers a choice of the horse which stood nearest the door, so was the New York Order drawn to enforce penalty payments.

One of the major arguments advanced by the Department of Agriculture in the *Lawson* case was that if

"full" regulation had been extended to all retail distributors no matter how small a proportion of their total business was done in the marketing area, the cost to distributors having most of their business in another market would be more expensive to them than the penalty payments. Of course such an argument would justify any kind of regulation, no matter how illegal, so long as it was "cheaper" than the cost of regulations measured by the ultimate reach of government power. But the plausibility of such a "bargain" is a tempting allurement from the plain logic of such a completely lawless "choice" between a cheaper illegal regulation and a more expensive one, colorably legal. Therefore, it might be well to observe that it is a "bargain" for the "insiders" as well. A policy of regulation in accordance with the Congressional mandate—"full" regulation in respondents jargon—would tend to break down the governing oligarchy of the urban market, dissipating its power by extending it too widely. The plain fact which all must admit both in the *Lehigh* case before the Court and in the *Lawson* case is that the prices actually being paid by these "non-pool" handlers from neighboring markets are higher than any of those required to be paid by the regulated "pool" handlers. This is as plain an illustration as can be found for the lack of any good faith purpose in extending "full" regulation to these adjacent areas. It is precisely because the prices these outsiders actually pay for their milk is so greatly in excess of the protected market's Class III or surplus price that the regulations are termed "penalty payments."

**Direct Impact of Price Dircrimination Upon Dairy Farmers or "Producers"**

Finally it is illuminating to consider the principal point of difference which distinguishes both *Lehigh* and *Lawson* from *Kass*. Both *Lehigh* and *Lawson* are retail milk dealers who have their own producers, or dairy farms, so that whatever milk they sell in the protected marketing area is milk bought directly from farmers. In *Kass* v. *Brannan* the milk sold in the marketing area was not bought directly from farmers or producers, but indirectly through a wholesale milk dealer.

Section 8c(5)(A) provides for the classification of milk in accordance with its use and fixing "minimum prices for each such use classification which all handlers shall pay . . . . for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers . . ." The majority in *Kass* gave primary emphasis to the twice repeated "all handlers" part of this price uniformity provision, and applied it to both direct and indirect milk purchases from producers. The dissent reversed the order of emphasis of the majority. Price uniformity among handlers was only required in the case of milk purchased directly from producers, and was not required of indirect purchases through other handlers.

The District Judge in *Lawson* succinctly sums up the dissent in *Kass:* "Section 8c(5)(A) makes no reference to the fixing of minimum prices which handlers shall pay to handlers." He then extends the principle of the dissent to *Lawson*, saying: ". . . Minimum class prices authorized by Section 8c(5)(A) of the Act . . . apply only to classified milk, i.e.—milk purchased from producers. During the period in question plaintiff

made no purchases from 'producers' as that term is defined by Order No. 75 . . ." which excludes farmers shipping to non-pool plants. Careful note should be taken that the principle of the dissent in *Kass* must be extended to reach *Lawson* and *Lehigh*. The *Kass* dissent merely asserted that "milk purchased from producers . . ." did not include indirect purchases from farmers through dealers. Here *Lawson* and *Lehigh* purchased direct from "producers, i.e.—dairy farmers" but the order definition of "producers" did not include them.

Thus, while it is clear that the majority opinion in *Kass* is broad enough to cover the *Lawson* and *Lehigh* cases, the dissent is not. Learned Hand is willing to suspend the requirement of price uniformity among all handlers in purchases from other handlers. Is he willing to suspend it in purchases from different classes of producers? More particularly, is he willing to suspend it as to new producers coming into the market? This subject is hardly within the scope of his dissent.

More particularly opposed to this view of distinguishing between producers is Section 8c(5)(D). In speaking of this subsection, the Senate Report (No. 1011, 74th Cong. 1st Session) says at page 11, as does the Conference Report (House No. 1757) at page 21:

> "To prevent the destruction of the minimum price schedules which may be fixed in an order, handlers subject to it may be required to pay, for a period of 90 days, a price fixed for milk classified for manufacturing purposes to producers not theretofore selling milk for consumption in the area covered by the order. This time limitation is designed to prevent assaults upon the price structure by the sporadic importation of milk from new producing areas, while permitting the orderly and natural ex-

pansion of the area supplying any market by the introduction of new producers or new producing areas. This is the only limitation upon the entry of new producers—wherever located—into a market, and it can remain effective only for the specified 90-day period."

Plainly no retail milk dealer can make "sporadic" assaults on a market, his business being most largely dependent on building up a retail trade from day to day. Plainly adjacent retail dealers are not ever buying inspected milk at anything approaching a Class III price. Plainly also, penalty payment provisions do not end after a three months period. It necessarily follows therefore that the limited deterrent provided by Section 8c(5)(D) has been extended beyond the bounds of all reason, without even making reference to it, but relying instead on the "tailpipe" of Section 8c(7)(D). Cf. *Brannan* v. *Stark*, 342 U.S. 451, 453. The "tailpipe" cannot stand the weight of so heavy a monument to protectionism as this.

## CONCLUSION

The delegation of authority in the Agricultural Marketing Agreements Act of 1937 is extremely narrow and carefully restricted. This is not simply because of the direct influence *Schecter* v. *U. S.*, 295 US 495, had on its original enactment, but is also the result of important policy considerations in the grant of legislative sanction to monopoly pricing practices and exemption from the anti-trust laws. This is seen in the circumstance that although the act has been frequently amended, its rare specificity has never been relaxed. One such detailed amendment was made in Sections 8c(5) and (7) after the narrow construction of these

provisions in *Brannan* v. *Stark* (1952), 342 U.S. 351, and *Kass* v. *Brannan* (1952), 196 F. 2d 791. This Act of August 28, 1954, c. 1041, Title IV, Section 401(b)-(d), 68 Stat. 907, made no change in the language construed. The Court should not permit an extension of monopoly power which Congress has thus so long withheld.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT

## REPLY BRIEF FOR STATE OF MINNESOTA AMICUS CURIAE

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## REPLY BRIEF FOR STATE OF MINNESOTA AMICUS CURIAE

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1. Throughout its brief the Government argues that the regulations under attack are necessary to protect the market's regular or reliable suppliers against the competition

of "unregulated" milk. The primary purpose of §§ 927.83 and 927.84 of the order (7 C.F.R. 927.83, 927.84) is to prevent outside milk from displacing "sales that otherwise would have been made by pool handlers * * *." (Resp. Br. p. 25) The Government does not dispute the exclusionary effect of the challenged regulations. It defends them with the following argument (Resp. Br. pp. 29-30):

> "It is true that the compensatory payment requirement may very well work to the disadvantage of the nonpool operator in selling fluid milk within the marketing area—for any milk purchased at more than the Class III minimum price his total cost will be more than the Class I minimum price—but, as the Secretary found, there is no workable means of putting pool and nonpool operators on a plane of absolute equality. It is the pool operator and his producer who produce primarily for the marketing area, and when a choice has to be made it is not unfair to protect them as against the nonpool operator and his farmers whose interests in the marketing area are normally peripheral."

Unless privileged by some statutory exemption, marketing practices such as those in issue here are prohibited as an unlawful restraint of trade. *United States v. Maryland & Virginia Milk Producers Ass'n, Inc., et al.*, 179 F. 2d 426 (C.A.D.C.), certiorari denied 338 U.S. 831; *Maryland & Virginia Milk Producers Ass'n, Inc. v. United States*, 193 F. 2d 907 (C.A.D.C.). Both cases involved a contract and an alleged criminal conspiracy to restrain trade in violation of § 3 of the Sherman Act. The contract is fully described by the court in its decision on the second appeal as follows (193 F. 2d at p. 911):

> "The contract between the Association and Safeway contained the following provision:

"'(3) Distributors shall pay to the Association for all milk and or cream sold and delivered to it by the Association the minimum prices, according to the use to which said milk and or cream is put, in the manner and in the amount provided for in the Marketing Agreement and Order for the Washington Marketing Area, which agreement has been approved by the United States Secretary of Agriculture and became effective February 1, 1940. A copy of said Marketing Agreement and Order is attached hereto as Exhibit "A" and by reference made a part hereof.' * * *

"* * * * *

"Under the classified use plan, milk which is utilized by the distributors for resale in fluid form is known as Class I and is paid for at the highest of three prices. Class II is milk used for cream and cottage cheese, and Class III is that which is converted into manufactured products. At the time of the trial the prices of Classes II and III were identical. This classified use system has been employed in the industry since 1916. It was one of the features of a formal marketing agreement executed in 1940 between the Association and the distributors under the Agricultural Marketing Act, a contract to which the Secretary of Agriculture was a party.

"The Association cancelled this agreement as of March 31, 1947, as it had a right to do under the Act itself. * * *" (Footnotes omitted.)

The court then noted (193 F. 2d at pp. 915-916):

"* * * this court said on the first appeal of the present case: '* * * "full supply contracts," however legal they may be in other circumstances * * * are illegal when made for the purpose of eliminating and suppressing competition. Complete monopoly is of course unnecessary; * * *' and later added, 85 U.S. App. D.C. at page 182, 179 F. 2d at page 128: 'Although the Capper-

> Volstead Act, 42 Stat. 388, 7 U.S.C.A. § 291, and the Clayton Act, 38 Stat. 730, 731, 15 U.S.C.A. § 17, give some privileges to combinations of agricultural producers, a combination of producers and distributors to eliminate competition and fix prices at successive stages in the marketing of an agricultural product is not privileged.'"

It is clear that here, too, absent the Secretary's approval, the challenged marketing arrangements would be "in violation of Section 3 of the Sherman Act, *United States v. Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150 * * * unless relieved of this consequence by approval of such arrangements under some valid law, such as the Agricultural Marketing Agreement Act of 1937 * * *." *Maryland & Virginia* case, 193 F. 2d at p. 918, dissenting opinion.

Nowhere, however, does the Act authorize the Secretary to include in a milk order terms and conditions that have the avowed purpose and effect of foreclosing competition from a substantial market. Unable to find in the Act an express grant of authority to permit the exclusion of competing milk supplies, the Government argues that the compensatory payment provisions are authorized by § 8c(7)(D), 7 U.S.C. 608c(7)(D), as "[i]ncidental to, and not inconsistent with, the terms and conditions specified in subsections (5) - (7) of this section and necessary to effectuate the other provisions of such order." (Resp. Br. pp. 30-31)

But an intent to authorize market practices prohibited by the antitrust laws cannot be implied from the grant of an "incidental" power "to effectuate the other terms of [the] order"; for it is unlikely "that Congress intended to create 'so great a breach in historic remedies and sanctions.'"

*United States v. Borden*, 308 U.S. 188, 198. As this Court said in that case (308 U.S. at 199):

> "The Sherman Act is a broad enactment prohibiting unreasonable restraints upon interstate commerce, and monopolization or attempts to monopolize, with penal sanctions. The Agricultural Act is a limited statute with specific reference to particular transactions which may be regulated by official action in a prescribed manner. The Agricultural Act declares it to be the policy of Congress 'through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period' described. To carry out that policy a particular plan is set forth. Farmers and others are not permitted to resort to their own devices and to make any agreements or arrangements they desire, regardless of the restraints which may be inflicted upon commerce. * * *"

The defendants in that case claimed, and the lower court held, that by enacting the Agricultural Marketing Agreement Act of 1937, Congress had indicated an intent to exempt milk marketing arrangements from the operation of the Sherman Act (*Borden* case *supra* at p. 197)[1]; that antitrust concepts are inapplicable in testing the lawfulness of milk marketing practices. Replying to that argument, the Solicitor said:[2]

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[1]Cf. *Maryland & Virginia Milk Producers Association, Inc. v. United States*, 362 U.S. 458.

[2]See Record, *United States v. Borden*, Brief for the United States, pp. 25, 28, 29.

"The view of the court below appears to be that a series of laws enacted since the Sherman Act, although not expressly exempting agricultural products from the operation of that Act, have so undermined its basic political philosophy with respect to commerce in agricultural products that the Act no longer applies to such commerce—in short, that these later statutes have repealed the Sherman Act, so far as agricultural products are concerned, not expressly but by implication.

"This result is in conflict with well-established canons of statutory construction. The courts do not favor repeal by implication. * * * (Citing cases.)

"Furthermore, exemptions from statutes cannot be sustained merely by reference to shifts in general legislative policy but must rest upon a clear statutory expression of the intention to grant the exemption. * * * (Citing cases.) * * *

"* * * * *

"The agricultural legislation involved in this case aids rather than impedes the application of the Sherman Act to agricultural products by clarifying the conception of what are reasonable combinations and reasonable restraints in agricultural production and distribution. The Sherman Act itself does not prohibit reasonable restraints of trade. It has a double function (1) to prevent *unreasonable* restraints and (2) to define the activities of *reasonable* combinations. Broadly speaking, combinations or the exercise of power by combinations, are reasonable where they are necessary for the efficient operation of an industry or the efficient marketing of its goods. * * * (Italics theirs.)

"* * * The intention of the Agricultural Marketing Agreement Act is in part to recognize the reasonableness of certain marketing practices as an aid both to collective bargaining and the efficient distribution of agricultural products with appropriate supervision by a responsible public official. That aid goes so far as to put

> a floor under milk prices, under certain conditions, none of which were in effect when this indictment was filed or when the acts changed [sic] in the indictment were committed. The purpose of this aid is to secure parity prices to farmers, *without destroying competition or preventing the application of the Sherman Act to activities in the distribution of the product not specifically covered by marketing agreements or orders.*" (Italics ours.)

Though Congress may limit the application of the Sherman Act to industries regulated by specific statutes, such industries "are not per se exempt from the antitrust laws and repeals are not favored. [T]he antitrust laws are superseded by more specific regulatory statutes *to the extent* of the repugnancy between them." (Italics by the court.) *Pennsylvania Water & Power Co. et al. v. Federal Power Commission*, 193 F. 2d 230, 235 (C.A.D.C.), affirmed 343 U.S. 414. Though the Federal Power Act expressly immunizes certain business arrangements in the power industry from the operation of the Sherman Act, the court recognized the need for accommodating the "contrasting objectives" (193 F. 2d at p. 234) of the two acts by noting (193 F. 2d at pp. 235-236):

> "* * * That is not to say that competitive considerations may not be components of the public interest sought to be served by a particular regulatory statute, and hence a guide to a commission's exercise of its authority when the question is properly before it. * * *
>
> "* * * This limited freedom of action is an important condition precedent to proper operation of the rate-making process. Without it, the rates proposed and approved may tend to find themselves in the upper reaches of the zone of reasonableness within which rates may properly fall. The antitrust laws have been

> the means of assuring that such initiative remains unchecked by conspiracies or other illegal arrangements with which the regulatory commission is powerless to deal. * * *"

Here, too, "the problem is to accommodate two Congressional policies embodied in different statutes, the one seeking to preserve a competitive business economy and the other to obtain better returns for farmers through the medium of collective marketing. * * * The problem is to determine 'how far Congress intended activities under one of these policies to neutralize the results envisoned by the other.' And this determination is to be made with due regard for the rule that any exemptions from the antitrust laws to be implied from provisions of the [Agricultural Marketing Agreement Act] are 'special exceptions to a general legislative plan,' that is, that basic Sherman Act provisions which have governed interstate trade since 1890. * * *"[3]

Such an exemption cannot be drawn from the "incidental" power of § 8c(7)(D).

2. Section 8c(5)(A) of the Act requires that "prices shall be uniform as to all handlers." The challenged provisions of Order No. 27 compel the petitioners, who "handle" milk for distribution in the marketing area, to bear a higher cost for that milk than required of their competing distributors. (Resp. Br. p. 29). Faced with the requirement of § 8c(5)(A) that "prices shall be uniform as to all handlers," the Government attempts to avoid the clear inconsistency between the Act and the Order by limiting the applicability

[3]See Record, *Maryland & Virginia Milk Producers Association, v. United States*, 362 U.S. 458, Brief for the United States, p. 28.

of § 8c(5)(A) to "handlers" *as defined in § 927.7 of the Order*, 7 *C.F.R.* 927.7. (Resp. Br. p. 36) Milk distributors, unable to meet the "handler" definition because of operations in several markets are simply read out of the Act and the market area by characterizing them as "nonpool handlers." Except for a strained reliance on § 8c(11)(A), 7 U.S.C. § 608c(11)(A) (Resp. Br. p. 37), no authority is cited to support the "handler-nonhandler" distinction. An attempt is made to construct a rational basis for the distinction by arguing that it is contemplated by the regional regulatory plan provided for in § 8c(11)(A). (Resp. Br. p. 37)

The difficulty with the argument is that not only are these petitioners located within an area contiguous to the "regional marketing area," they are, in fact, closer to it than many of the market's "pool handlers." In addition, all of the dairy farmers who supply petitioners are located within the normal supply area for the market.[4] No claim has ever been made that either these petitioners or their dairy farmers are situated in a "peripheral" supply area. (Resp. Br. p. 30)

A more serious difficulty with the argument, however, is that the limitation placed on the term "handler" by the Secretary is not warranted by the Act. Section 8c(1), 7 U.S.C. § 608c(1) authorizes the Secretary to issue "orders applicable to processors, associations of producers, and others engaged in the handling of * * * [milk]. Such persons are referred to in [the Act] as 'handlers.'" Section 8c(5), 7 U.S.C. § 608c(5) provides that "orders issued pursuant to this section shall [among other things] provide: (A) [for the fixing of] minimum prices * * * which *all handlers*

[4] See Brief of Dairymen's League Cooperative Association, Inc., et al., *amici curiae*, map showing location of plants in Order No. 27 marketing area.

shall pay * * *. Such prices shall *be uniform as to all handlers*, * * * (B) [p]roviding (ii) for the payment to all *producers* * * * delivering milk *to all handlers* of uniform prices for all milk so delivered * * *" Subject * * * only to * * * (d) a further adjustment, equitably to apportion the total value of the milk purchased by *any handler*, or by *all handlers*, among producers * * * on the basis of their marketings of milk during a representative period of time." (Emphasis supplied.)

Nowhere in the Act is the Secretary empowered to change "all handlers" to "some handlers." Nowhere does the Act say that the Secretary may exclude some handlers from the market on the basis of his determination that they are not properly a part of the "regional marketing area." The Act's provisions for separate marketing areas (Resp. Br. p. 36) do not permit such an exclusion. The Conference Report on the bill stated:

> "Amendment No. 21: Under the House bill the uniform prices to be paid to producers for milk under the orders were to be subject to adjustments * * * to accomplish the result of equitable apportionment of the total value of milk sold *by any or all handlers*. This amendment provides for the same apportionment but it is on the basis of the milk 'purchased' *by any or all handlers*."[5] (Emphasis supplied.)

Since petitioners distribute milk in the Order No. 27 marketing area, there can be no question that they are "handlers" —whether pool or nonpool— within the meaning of the Act. If they are "handlers," then, necessarily, they must be included within the term "any handler" or "all handlers." (§ 8c(5).)

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[5]H. R. Rep. No. 1757, 74th Cong. 1st Sess. p. 20.

The Government's reliance on § 8c(11) (Resp. Br. pp. 36-39) and its claim that the regional regulatory plan "contemplated by the Act" (Resp. Br. p. 37) requires "the conclusion * * * that Section 8c(5)(A) was directed to pool handlers only" (Resp. Br. p. 37) is without any support in the Act. The "different terms, applicable to different * * * marketing areas" (§ 8c(11)(C)) that may be included in an order must, in any case, be within the limited terms and conditions authorized by §§ 8c(5)–(7). While citing §§ 8c(11)(A) and 8c(11)(C) to support its "regional marketing" argument, the Government ignores completely § 8c(11)(B) which expressly excepts milk and milk products from the "regional marketing" concept of § 8c(11). In the House and Senate reports on the bill, § 8c(11) is explained as follows:[8]

> "So that proper recognition may be given to local differences which may exist in production or marketing methods or conditions, orders are required to be limited in their application to the smallest practicable regional production or marketing areas, and orders applicable to the same commodity or product are required to prescribe such terms applicable to different production or marketing areas as will recognize local production and marketing differences. *Orders relating to milk and its products are exempted from the requirement that they be limited in their application to the smallest practicable regional production or marketing areas.*" (Emphasis supplied.)

3. The Government states on page 41 of its brief that "[t]his Court has acknowledged that the Act permits the

[8] S. Rep. No. 1011, 74th Cong. 1st Sess. p. 9; H. R. Rep. No. 1241, 74th Cong. 1st Sess. p. 9.

Secretary to differentiate among dairy farmers. *H. P. Hood & Sons v. United States*, 307 U.S. 588, 597-599. * * *" The statement, while true, is misleading; and read in context supports petitioners' position rather than the Government's. The *Hood* case, in fact, is a complete answer to the Government's attempt to eliminate petitioners' dairy farmers from the ambit of the term "producer." One of the questions in *Hood* was the meaning of the term "producers" entitled to vote in a referendum to determine producer approval of a proposed order under § 8c(9)(B)(i), 7 U.S.C. § 608c(9)(B)(i). This Court held that the term "producer" means simply a dairy farmer who, during a representative month prior to the order, delivered milk to a plant for sale in the marketing area. (307 U.S. at p. 598) The holding supported the Secretary's administrative construction of the term[7] in that case and, if followed here, would invalidate the "producer - dairy farmer" distinction upon the basis of which the present Order No. 27 regulations are constructed.

4. The Government states that petitioners' arguments of invalidity based on §§ 8c(5)(G) and 8c(5)(D) are not properly before the court because they were not raised before the agency. (Resp. Br. pp. 52, 54)

The question for decision in this case is whether certain provisions of Order No. 27 are authorized by the Act. If they are prohibited by or inconsistent with §§ 8c(5)(G) and

[7]"The Secretary considered as producers those persons who, during a representative period (May, 1937), delivered milk to a station, which station in that month shipped some part of its products to the marketing area as milk or cream and was approved by one or more of the health authorities in the marketing area." See Record, Vol. II, *Hood & Sons v. United States*, 307 U.S. 588; *Whiting Milk Company v. United States*, No. 809, Brief for Respondent p. 115.

8c(5)(D), it follows that they cannot stand on the "incidental" powers of § 8c(7)(D) as claimed by the Government. (Resp. Br. pp. 30-31)

The rule that precludes judicial review of issues not raised before the administrative agency is inapplicable where the action taken by the agency is challenged as wholly beyond its statutory authority. *Leedom v. Kyne*, 358 U.S. 184; *F.T.C. v. Henry Broch*, No. 74, Oct. Term 1961. The distinction between such a challenge and an attack on the agency's findings or rulings was thoroughly considered by this Court in *Broch* and was relied upon by the Solicitor in his argument to the Court.

5. It is no answer to the § 8c(5)(A) requirement of uniform class prices to say that the Act requires only that *minimum prices* shall be uniform and that there is no statutory prohibition against paying more than the minimum price. (Resp. Br. p. 45) The issue here concerns the minimum price that handlers are *required* to pay by the Act and its regulations; not the cost that the handler chooses to incur by voluntary payments in excess of the minimum prices. Petitioners' complaint is that the challenged provisions compel them to pay a price higher than that charged pool handlers for milk used for the same purpose. It is the compulsion of the challenged regulations that violates the uniformity requirements of § 8c(5)(A) regardless of what arrangements are worked out between petitioners and their farmers.

6. To say that the compensatory payments made to the Producer Settlement Fund are not part of the "price" is to fail to perceive the purpose and operation of the equalization fund. (Resp. Br. p. 48) The fund is simply a clearing house and conduit through which handlers who have a utilization higher than the market average pay the excess to

those handlers having a lower utilization, to permit the latter in turn to pay producers the uniform price established in the market. The money paid in or taken out of the fund is paid, in turn, to the producers and represents a portion of the price that they receive for their milk. If the compensatory payment paid into this fund for distribution to producers is not part of the price, then what is it? How else is it reflected on the accounts of the handler who pays it if not as part of the cost of his milk?

7. The challenged provisions are described by the Government as a plan for "partial regulation." (Resp. Br. pp. 55-57) It argues that since petitioners' fluid milk sales in other markets may be subjected to full regulation under Order No. 27, they should not complain of the "benefits of partial regulation in lieu of full regulation. * * *" (Resp. Br. pp. 55, 56)

Petitioners' complaint is not against "partial regulation" but, rather, against discriminatory regulation. With respect to milk sold in the marketing area covered by Order No. 27, petitioners are required to pay a tariff which disables them from competing with other Order No. 27 handlers. They may avoid the payment by electing to subject *all* their fluid sales — in regulated and non-regulated markets — to the Order No. 27 market administrator's regulatory power. (Resp. Br. p. 56) Since the latter alternative would subject to regulation some milk sold in unregulated areas in competition with unregulated handlers, petitioners choice is between loss of their share of the Order 27 market or loss of their other markets—a choice intended to force petitioners out of the Order No. 27 marketing area.

The Act regulates handlers with respect to milk sold in a regulated area. The Secretary is permitted to issue an order

fixing prices whenever he finds "that the parity prices of [milk] are not reasonable in view of * * * the economic conditions which affect market supply and demand for milk * * * *in the marketing area to which the contemplated* * * * *order* * * * *relates.*" (§ 8c(18), U.S.C. § 608c(18).) (Emphasis supplied.) The first issue in every promulgation proceeding called to consider the adoption of an order in a marketing area is the question of "need for an order." In every decision and recommendation following such a hearing, there is included under the Secretary's Findings and Conclusions his determination with respect to the conditions in the marketing area which call for the exercise of his regulatory power. (See e.g., R. 698a.) Section 8c(4), 7 U.S.C. § 608c(4) directs the Secretary, after notice and opportunity for hearing, to:

> "* * * issue an order *if he finds, and sets forth in such order, upon the evidence introduced at such hearing* (inaddition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of [the Act] with respect to such commodity." (Emphasis supplied.)

Many areas of the United States are not regulated by a marketing order because no finding of need for regulation has ever been made in these areas. Nonetheless, the Government argues that the Administrator of Order No. 27 has the power to determine the price that handlers shall pay for milk sold in any area of the United States. A power based upon the need for regulation in the Order No. 27 marketing area is thus extended to other marketing areas notwithstanding the total absence of any evidence that would justify the exercise of regulatory power in such areas.

The Secretary's regulatory power is limited only to handlers with respect to milk sold in a regulated marketing area. See *United States v. Rock Royal Cooperative, Inc., et al.*, 307 U.S. 533, 565. The power to subject to regulation milk sold by petitioners outside of the marketing area, claimed by the Secretary, is wholly without warrant in the Act and is contrary to its purpose.

## CONCLUSION

Minnesota's interest in these proceedings arises from its position as the second largest milk producer in the United States. Access to markets is necessary if the vigor of its dairy industry is to be maintained. The challenged regulations of Order No. 27 reflect a protected market concept of the dairy industry that is inappropriate to the 1960's and which keeps Minnesota's dairy business in a state of "arrested development." Cf. *Georgia v. Pennsylvania RR Co.*, 324 U.S. 439, 444, 450. For the foregoing reasons the State of Minnesota urges that the decision of the court below be reversed.

Respectfully submitted,

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